Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM 1977

No. 78-87

ENVIRONMENTAL DEFENSE FUND, INC.; OCEANIC SOCIETY; SAVE THE AMERICAN RIVER ASSOCIATION; PETER ZARS; LUCRETIA EDWARDS; and JEAN SIRI,
Petitioners

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT; DEWITT KREUGER; ROBERT T. NAHAS; A. C. CARRINGTON; G. HOWARD ROBINSON; CHARLES J. WRIGHT; JOHN S. HARNETT; and DOES I THROUGH XX,
Respondents

PETITION FOR A WRIT OF CERTIORARI to the California Supreme Court

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	3
Statutes involved	3
Statement of the case	5
Reasons for granting the writ	9
Argument	9
Conclusion	16

Table of Authorities Cited

Cases

	Pages
Arizona v. California, 373 U.S. 546 (1963)	12, 14
California v. United States, October Term, 1977, No. 77-285, decided July 3, 1978	3, 9, 12, 13, 14, 15
City of Fresno v. California, 372 U.S. 627 (1963)	11, 12, 13
Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958)	11, 12, 13
Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110, 514 P.2d 111, 109 Cal.Rptr. 799 (1973)	10

Constitutions

California Constitution, Art. X, Sec. 2	3, 4, 9, 10

Statutes

28 U.S.C., §1257(3)	2
43 U.S.C.:	
§§372 et seq.	3
§372	3, 9, 14, 15
§383	3, 9, 14, 15
§616aaa	13, 14
§616ccc(a)(iii)	13
§616ccc	14

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Petitioners, Environmental Defense Fund, Inc., Oceanic Society, Save the American River Association, Peter Zars, Lucretia Edwards and Jean Siri,

respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court, rendered in this proceeding on February 23, 1978.

OPINIONS BELOW

The final opinions of the California Supreme Court, as modified on rehearing, are reported at 20 C.3d 327 and 20 C.3d 652a, 572 P.2d 1128, 142 Cal.Rptr. 904 (1978) (Appendix A). The opinion of the California Court of Appeal, as modified on rehearing, is unofficially reported at 125 Cal.Rptr. 601 (1975) (Appendix B). The opinion of the Superior Court for the County of Alameda is unofficially reported at 5 E.R.C. 1295 (1973) (Appendix C).

JURISDICTION

The final judgment of the Supreme Court of California, denying rehearing of a judgment entered December 20, 1977, was entered on February 23, 1978. On May 12, 1978, Mr. Justice Rehnquist extended the time for filing a petition for writ of certiorari to and including July 10, 1978. On June 30, 1978, Mr. Justice Rehnquist granted petitioners a further extension, to and including July 17, 1978. This petition is filed within the time period of the further extension.

Jurisdiction of this Court to review the judgment of the California Supreme Court is conferred by 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does the majority opinion of the California Supreme Court in this case conflict with the opinion of this Court in *California v. United States*, October Term, 1977, No. 77-285, decided July 3, 1978?

46 LW 4981

2. Was the California Supreme Court correct in interpreting prior cases of this Court to hold that in passing the Reclamation Act of 1902, 43 U.S.C. §§ 372 et seq., Congress intended to preempt state law not only when direct conflict between federal and state law exists, but also when danger exists that state law may interfere with powers expressly delegated to the Secretary of the Interior, may frustrate the operation of a federal project, or may limit the benefits of the project?

3. May petitioners' complaint in this case, liberally construed, state a cause of action under state law which is not preempted by the operation of federal law?

STATUTES INVOLVED

The statutes involved in this matter are section 8 of the Reclamation Act of 1902, 43 U.S.C. §§372, 383, and Article X, §2 of the California Constitution.

Section 8 reads as follows:

> Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secre-

tary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

Article X, §2 reads as follows:

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable,

in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in furtherance of the policy in this section contained.

STATEMENT OF THE CASE

Petitioners, who were plaintiffs below, are three environmental organizations and three individuals. Respondents are the East Bay Municipal Utility District (EBMUD), a state-created agency charged with water supply and sewage disposal functions in much of the area immediately east of San Francisco Bay in California, EBMUD's directors, and EBMUD's general manager. The County of Sacramento intervened as a plaintiff below.

Petitioners filed suit in July, 1972 in Alameda County Superior Court challenging two aspects of respondents' water management policies, only one of which is relevant here. First, petitioners disputed respondents' failure to undertake a wastewater recycling program that would have afforded EBMUD an economical source of additional water suitable for industrial, cooling, irrigation, and other non-domestic uses, and that would have diminished respondents' pollution of San Francisco Bay.

Second, petitioners challenged respondents' determination to seek a supplemental supply of water by purchase from the United States from the Folsom South Canal when a diversion point closer to the East Bay would have been more economical and when a downstream diversion point would have increased the amount of water available upstream for recreational and fish and wildlife uses in the lower American River near Sacramento.[1]

Thus, petitioners' basic claims were two: (1) respondents are wasting water, and unnecessarily polluting San Francisco Bay, by not recycling their wastewater; and (2) respondents are preventing multiple use of the waters in the lower American River by unreasonably diverting their supplemental supply from an upstream rather than a downstream location.

In April, 1973, the Superior Court filed an opinion (Appendix C) sustaining without leave to amend respondents' general demurrers both to petitioners' first amended complaint[2] and to the complaint-in-intervention of the County of Sacramento. The Superior Court reasoned that the case was governed by federal, not state, law, because respondents' supplemental source of water had been obtained by contract with the United States. In a separate portion of its opinion sustaining respondents' demurrers, the Superior Court

[1]Intervenor County of Sacramento joined petitioners in their second claim in a separate complaint-in-intervention.

[2]Petitioners' first amended complaint incorporated all factual allegations in their original complaint, as well as many of the factual allegations in the County of Sacramento's complaint-in-intervention. The prayers for relief in petitioners' two complaints were identical.

also ruled that petitioners had not stated causes of action under state law, because the applicable state precedents had all involved competing water rights claims in the nature of property rights.

Petitioners appealed the Superior Court judgment and in December 1975, the California Court of Appeal, First Appellate District, rendered its final decision, 125 Cal.Rptr. 601 (1975) (Appendix B). The Court of Appeal reversed the judgment of the Superior Court as to petitioners' wastewater reclamation cause of action, holding that petitioners had stated a cause of action for unreasonable use, but affirmed the dismissal of intervenor's complaint, holding that the water respondents were buying was "federal water" and thus beyond the purview of the state courts. (In so holding, the Court of Appeal, by inference, ruled unfavorably on petitioners' unreasonable diversion cause of action.)

Respondents, petitioners, and intervenor all then petitioned the California Supreme Court for a hearing. A hearing having been granted and the Court of Appeal decision having been vacated, on December 20, 1977, the California Supreme Court rendered its initial decision affirming the judgment of the Superior Court, 20 C.3d 327 (1978) (Appendix A). The initial California Supreme Court decision affirmed the dismissal of petitioners' complaint on two grounds. First, as to petitioners' claim that respondents' proposed upstream diversion was unreasonable because it prevented multiple use of the waters of the American River, the Court held that this claim was pre-

empted by federal law, 20 C.3d at pp. 334-40 (Appendix A at pp. 6-17) because petitioners were attempting "to use state law to determine a matter within the authority of the federal agency", 20 C.3d at p. 334 (Appendix A at p. 6). Second, as to petitioners' wastewater reclamation claim, the Court affirmed the Superior Court judgment on state law grounds, holding that the claim was not properly before the Court because petitioners had not in the first instance sought relief from a California Regional Water Quality Control Board and having failed to do so were precluded from maintaining such a claim against respondents, 20 C.3d at p. 341 (Appendix A at p. 17).

Justice Richardson, in a separate opinion, "concur[red] in the judgment, with some misgivings", 20 C.3d at p. 345 (Appendix A at p. 23). Although he fully agreed with the majority's holding dismissing petitioners' wastewater reclamation claim on state law grounds, he expressed "considerably less confidence" in the majority's holding that petitioners' unreasonable diversion claim was preempted by the Reclamation Act, 20 C.3d at p. 345 (Appendix A at p. 24).

Justice Mosk filed a dissenting opinion, in which he disagreed with the majority's views on both of petitioners' claims, 20 C.3d at pp. 346-52 (Appendix A at pp. 25-35).

Petitioners filed a petition for rehearing, which was denied by the Court on February 23, 1978. The Court at that time, however, did modify its initial decision, holding on rehearing that petitioners' wastewater

reclamation claim should have been brought in the first instance before the California State Water Resources Control Board, not the Regional Water Quality Control Board, 20 C.3d 652a, 572 P.2d 1128, 142 Cal.Rptr. 904 (1978) (Appendix A at pp. 37-38).

This petition for a writ of certiorari, to review the California Supreme Court's judgment that petitioners' second cause of action was preempted by federal law, follows.

REASONS FOR GRANTING THE WRIT

1. The California Supreme Court decision in this case conflicts with the decision of this Court in *California v. United States,* October Term 1977, No. 77-285, decided July 3, 1978.

2. An order by this Court vacating the judgment of the California Supreme Court and remanding the case to the California courts for further proceedings not inconsistent with this Court's decision in *California v. United States,* would enable the California courts to apply section 8 of the Reclamation Act of 1902, 43 U.S.C. §§ 372, 383, correctly to a controversy involving an alleged conflict between that Act and a California Constitutional provision, Article X, § 2, which prohibits the unreasonable use and unreasonable diversion of water in California.

ARGUMENT

Petitioners' second cause of action in their complaint in this case contested respondents' decision "to

seek a supplemental supply of water from the Folsom-South Canal above Clay." Based on the allegation that this decision violated the California constitutional prohibitions against unreasonable use and unreasonable diversion of water, Article X, § 2, because it prevented the multiple use of the waters of the American River for water supply and fish, wildlife and recreation, petitioners' complaint prayed for a declaration stating that respondents' decision violated the Constitution, for an order enjoining respondents to use their best efforts to seek rescission of their contract to purchase water from the United States, and for an order enjoining respondents from issuing bonds to raise funds to construct facilities for the transmission and distribution of water from the American River.[3] Respondents demurred to this portion of petitioners' complaint by alleging in part that respondents' contract to purchase water from the United States "as a federal contract is not subject to state constitutional or statutory provisions."

The California Supreme Court majority opinion sustaining respondents' demurrer as to the cause of action outlined above held as follows:

> We conclude the Reclamation Act preempts state law (1) when state law conflicts with federal law, (2) when federal law vests the federal agency with final authority over the subject matter, or (3) when the application of state law would frustrate a federal objective. Insofar as the complaints challenge construction of the canal and the choice of diversion point on the basis of state law, they fail to state a cause of action because they attempt to use state law to determine a matter within the authority of the federal agency.[4]
>
> 20 C.3d at p. 334 (Appendix A at p. 6).

[3]Under California law, a complaint should be liberally construed to determine whether it states facts indicating that plaintiffs are entitled to some relief. *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 514 P.2d 111, 109 Cal.Rptr. 799 (1973).

In so holding, the California Supreme Court misconstrued several prior cases decided in this Court. First, it stated that *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958):

> fails also to support plaintiffs' and intervener's claim that section 8 permits the states to determine who may receive water from a federal project and under what conditions.
>
> 20 C.3d at p. 336 (Appendix A at pp. 9-10).

Second, it stated that *City of Fresno v. California*, 372 U.S. 627 (1963):

> extends the preemption doctrine by holding state laws preempted when they impair powers delegated to the administrator.
>
> 20 C.3d at p. 336 (Appendix A at p. 10).

[4]Justice Richardson, in a separate opinion, concurred in the judgment "with some misgivings." His opinion states:

> Thus, were we writing upon a clean slate, we might reasonably determine that state laws regarding water use and diversion must control despite the fact that a federal project is involved. After all, the project at issue was intended to afford improved water distribution facilities for *California* users, and it seems somewhat anomalous to hold that such a local project is exempt from state laws aimed at promoting reasonable water use for California citizens.
>
> 20 Cal.3d at p. 345 (Appendix A at p. 24).

Justice Mosk dissented, arguing that:

> there is no federal-state controversy which invokes the doctrine of preemption. The only conflict here is between

Finally, it stated that in *Arizona v. California*, 373 U.S. 546 (1963):

> The court held that Congress preempts state laws not only when direct conflict exists but also when danger exists in that state law either interferes with the secretary's expressly delegated powers, frustrates operation of the project, or limits the benefits of the project.[5]
>
> 20 C.3d at p. 338 (Appendix A at p. 13).

The majority opinion of this Court in *California v. United States* specifically demonstrates the errors of interpretation made by the California Supreme Court in the instant proceeding. With respect to the California Court's interpretation of *Ivanhoe* (that section 8 does not permit the states to determine who may receive water from a federal project and under what conditions), this Court held that it is clear from the legislative history of the Reclamation Act that:

---

the plaintiffs and the County of Sacramento on the one hand and a state-created agency on the other as to the propriety of action taken by the latter.

20 C.3d at p. 347 (Appendix A at p. 27).

[5]Justice Richardson's opinion reluctantly concurring in the judgment noted his views on *Ivanhoe*, *Fresno*, and *Arizona v. California* as follows:

> I note, however, that although the preemption decisions may be instructive, they are not directly on point—no decision of the United States Supreme Court has as yet adopted any ironclad, unequivocal rule which would invoke the preemption doctrine whenever operation of a federal project may be threatened by application of state law. Consequently, although I concur in the judgment herein, given the present uncertainties in the applicable decisions, I fully acknowledge that a definitive opinion on this difficult subject must come from the high court.
>
> 20 C.3d at p. 346 (Appendix A at p. 25).

> once the waters were released from the dam, their distribution to individual landowners would again be controlled by state law.
>
> *Slip op.* at p. 21.

Second, with respect to the California Court's reading of *Fresno* (that *Fresno* extended the preemption doctrine by holding state laws preempted when they impair powers delegated to the administrator), this Court explicitly disavowed the dictum in *Fresno* that "implies that state law does not control even where not inconsistent with such [explicit] expressions of congressional intent." *Slip. op.* n. 24 at p. 26. Instead, this Court read *Ivanhoe* and *Fresno* merely "as evidencing Congress' intent that specific congressional directives which were contrary to state law regulating distribution of water would override that law." *Slip op.*, n. 25 at p. 26.

The causes of action stated in petitioners' complaint do not conflict with any specific congressional directives. Indeed, they are consistent with, and actually would help to carry out, congressional directives in the legislation authorizing the project from which respondents have signed a contract to purchase water. That legislation authorizes the Secretary of the Interior "to allocate water and reservoir capacity to recreation and fish and wildlife enhancement." Auburn-Folsom South Act, 43 U.S.C. §§ 616aaa, 616ccc(a)(iii). This Act also states:

> Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water, and in the studies for the purposes of

developing plans for disposal of water as herein authorized the Secretary shall make recommendations for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs.

Auburn-Folsom South Act, 43 U.S.C. §§ 616aaa, 616eee.

Third, with respect to the California Supreme Court reading of *Arizona v. California* (that Congress has preempted state law not only when a direct conflict between federal and state law exists, but when the danger exists that state law may interfere with the Secretary's expressly delegated powers, that it may frustrate operation of a project, or that it may limit the benefits of a project), this Court specifically disavowed dictum in *Arizona v. California* "to the extent that it would prevent petitioner from imposing conditions on the permits granted to the United States which are not inconsistent with congressional provisions authorizing the project in question." *Slip op.* at p. 28.

In sum, this Court held in *California v. United States* that section 8 of the Reclamation Act of 1902, 43 U.S.C. §§ 372, 383, requires the Secretary of the Interior "to appropriate, purchase or condemn necessary water rights in strict conformity with state law," *slip op.* at p. 19, and that the "distribution [of water] to individual landowners would again be controlled by state law." *Slip op.* at p. 21. The California Supreme Court in the instant case read section 8 much more

narrowly, holding that the Reclamation Act, in spite of section 8, preempted the operation of state law "when danger exists" that state law might either interfere with the Secretary's expressly delegated powers, frustrate operation of a project, or limit the benefits of a project. 20 C.3d at p. 338 (Appendix A at p. 13).

Petitioners urge this Court to grant a hearing for the purpose of vacating the judgment of the California Supreme Court, so that the California courts may be given another opportunity to apply section 8 to the complaint at bar on the basis of the learning afforded by this Court's opinion in *California v. United States*. Petitioners' complaint is not preempted by the Reclamation Act. Indeed, petitioners' complaint states cause of action which will further the purposes stated in section 8 and in other congressional legislation. Only by granting certiorari and vacating the judgment of the California Supreme Court can this Court afford petitioners the opportunity to prove that their complaint states claims consistent both with federal and with state law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California Supreme Court.

Respectfully submitted,

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July 14, 1978

(Appendices Follow)

Appendices

Appendix A

(20 C.3d 327)

In the Supreme Court
of the
State of California

S. F. No. 23,422

Environmental Defense Fund, Inc., et al.,
Plaintiffs and Appellants,

vs.

East Bay Municipal Utility District, et al.,
Defendants and Respondents,

County of Sacramento, a political subdivision of the State of California,
Intervener and Appellant.

[Filed Dec. 20, 1977]

Opinion

Clark, J.—Plaintiffs and intervener appeal from judgment of dismissal following the court's sustaining defendants' demurrers without leave to amend. We affirm the judgment.

Plaintiffs, three corporations and three individuals, are residents of an area served by defendant East Bay Municipal Utility District (EBMUD), a governmental agency. Intervener is the County of Sacramento.

PLAINTIFFS' COMPLAINT

We first summarize the allegations of plaintiffs' complaint. Delivering water to approximately 1,100,000 persons in Alameda and Contra Costa Counties, EBMUD possesses water rights to 325 million gallons per day (mgd) from the Mokelumne River watershed, its principal source of water. The current average water consumption within EBMUD's service area is 212 mgd.

EBMUD organized and controls Special District One which operates a waste water treatment facility. This facility performs only "primary treatment" on the water, discharging the effluent into San Francisco Bay.

In the early 1960s EBMUD determined its Mokelumne River supply would be insufficient to meet the needs of its service area by the year 1985. EBMUD thereupon undertook a wide-ranging search for supplemental water supplies. In 1968, it entered an agreement with, among others, the United States Bureau of Reclamation (Bureau). By the terms of this agreement, EBMUD obligated itself to perform specified conditions if it later signed a contract with the Bureau. One condition obligated EBMUD to construct a canal, known as the Hood-Clay Connection, if the Bureau found such a canal necessary. The Hood-Clay Connection is an integral part of the Bureau's Central Valley Project, East Side Division.

EBMUD contracted with the Bureau in December 1970, agreeing to purchase, beginning in the year the

Bureau completes its Auburn-Folsom-South Project on the American River, up to 150,000 acre feet of water annually for a period of 40 years. This water is to be delivered to EBMUD from a diversion point on the Folsom-South Canal above its intersection with the proposed Hood-Clay Connection. This choice of diversion point renders the water unavailable to the lower American River.

EBMUD's actions will cause its 1985 consumers to pay a higher price for water than if EBMUD were to reclaim waste water. And EBMUD did not, in the course of its contractual negotiations, consider wastewater reclamation as a means of supplementing existing water supplies. EBMUD's agreements have contributed to the likelihood the Bureau will complete its East Side Division. And the Bureau's completion of this project will in turn diminish flows on the lower American River, injuring recreational opportunity, increasing salination, and accelerating wild river destruction. Finally, EBMUD's conduct will pollute San Francisco Bay.

On the basis of their allegations, plaintiffs assert three causes of action. As their first cause, plaintiffs claim EBMUD's decision not to develop reclamation facilities violates article X, section 2, of the California Constitution and Water Code sections 100 and 13500 et seq. Plaintiffs' second cause contends EBMUD's decision to obtain water from the American River violates the same provisions because it contributes to the likelihood the Bureau will complete the East Side Division project. The third cause asserts the combina-

tion of the two EBMUD decisions violates the constitutional and statutory provisions.

Plaintiffs seek three orders, one requiring EBMUD to use its best efforts to rescind the 1970 contract with the Bureau, the second prohibiting EBMUD from issuing bonds to finance the construction of facilities for transmitting and distributing American River water, and the third requiring EBMUD to undertake a reclamation program "as the proof will determine is required by law."

Intervenor's Complaint

The complaint in intervention incorporates plaintiffs' allegations. We summarize its additional allegations. The "lower" American River lies within the boundaries of Sacramento County. The river has been used by the public for scenic and recreational purposes for numerous years. In 1962, the county began developing an area along the river for a regional park, having now expended over $6 million.

EBMUD might have acquired water from the federal government at a point below the confluence of the Sacramento and lower American Rivers just as economically as from the diversion point actually chosen. As recognized by decision No. 1400 of the California Water Resources Control Board, the lower diversion point would not impair the recreational use of the American River.

In addition to the relief sought in plaintiffs' complaint, the complaint in intervention prays for a declaration that EBMUD lacked legal capacity to enter

the 1970 contract because the diversion point constitutes an unreasonable water use.

Plaintiffs' first amended complaint combines the allegations of their original complaint and of intervener's complaint, seeking the relief claimed in both.

The trial court sustained defendants' general demurrers on the ground the case is governed by federal —not state—law. In its extensive and well reasoned opinion, the trial court noted that EBMUD is purchasing water from a federal project authorized by Congress, that the Bureau has obtained a permit for the project from the State Water Resources Control Board (SWRCB), and that plaintiffs had not challenged the legality of the federal project. The trial court was of the opinion application of state law might render the water unsalable, interfering with the federal government's water rights and with the project itself.

While holding that federal law controls this proceeding, the trial court addressed plaintiffs' state law causes of action. The court held plaintiffs failed to assert a cause of action on the basis of article X of the California Constitution or Water Code section 100 because they were not claiming a property right in the water adverse to the rights of the defendants. The court further ruled Water Code section 13500 et seq. do not impose a legal duty on EBMUD to reclaim waste water.

FEDERAL PREEMPTION

At the outset we must determine whether the Reclamation Act of 1902 (43 U.S.C. § 371 et seq.) precludes application of state law to a contract between a state entity and the Bureau. It is undisputed that EBMUD *in general* possesses authority to contract with the Bureau. (Pub. Util. Code, §§ 12721, 12801, 12844.)

EBMUD contends the United States Supreme Court has interpreted the act as limiting application of state law to merely defining what constitutes a compensable property interest. EBMUD asserts state law is otherwise preempted. Plaintiffs and intervener on the other hand argue that the cooperative relationship between the states and the federal government established by federal law permits the states to determine who may receive water from a federal project and under what conditions. (See generally, Sax, *Problems of Federalism in Reclamation Law* (1965) 37 Colo.L.Rev. 49.)

We conclude the Reclamation Act preempts state law (1) when state law conflicts with federal law, (2) when federal law vests the federal agency with final authority over the subject matter, or (3) when the application of state law would frustrate a federal objective. Insofar as the complaints challenge construction of the canal and the choice of diversion point on the basis of state law, they fail to state a cause of action because they attempt to use state law to determine a matter within the authority of the federal agency. Insofar as the complaints seek to

compel EBMUD to reclaim water, there is no federal or state conflict, application of state law will not impinge on federal controls or interests, and state law is not preempted.

Under the terms of the 1970 contract, EBMUD will purchase water from the Auburn-Folsom South Unit, an integral part of the Bureau's Central Valley Project being constructed under authority of the 1902 act. (43 U.S.C. § 616aaa.) Projects constructed pursuant to the 1902 act are predicated on congressional authority under the general welfare clause of the United States Constitution. (Art. I, § 8; *Ivanhoe Irrig. Dist.* v. *McCracken* (1958) 357 U.S. 275, 294 [2 L.Ed.2d 1313, 1327, 78 S.Ct. 1174]; *U. S.* v. *Gerlach Live Stock Co.* (1950) 339 U.S. 725, 738 [94 L.Ed. 1231, 1242, 70 S.Ct. 955, 20 A.L.R.2d 633].)

The Reclamation Act of 1902 includes provisions concerning preemption. Section 8 states that the act is not to be construed as interfering with state laws relating to "control, appropriation, use or distribution of water used in irrigation . . . ." The congressional enactments specifically authorizing the Central Valley Project contain a similar provision. Section 616eee of 43 United States Code directs the Secretary of the Interior to make recommendations for the use of water in accord with state law. Additionally, the act contains a provision stating, "the policy of the Congress [is] to recognize the primary responsibilities of the State and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government

should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects." (43 U.S.C. § 390b.)

In *Ivanhoe Irrig. Dist.* v. *McCracken* (1958) 357 U.S. 275 [2 L.Ed.2d 1313, 78 S.Ct. 1174], the Supreme Court interpreted section 8 within the context of contracts between state agencies and the Bureau for delivery of water. The contracts contained clauses, pursuant to section 5 of the Reclamation Act (43 U.S.C. § 423e), providing that water from the federal project would not be delivered to parcels exceeding 160 acres unless the owner agreed to sell the excess land. In a proceeding to confirm the contracts, an owner of 309 acres challenged the acreage limitation on state law grounds.

This court (*Ivanhoe Irr. Dist.* v. *All Parties* (1957) 47 Cal.2d 597 [306 P.2d 824]) held that the United States, by appropriating water, did not acquire full title to the water but instead entered a trust relationship with the water users of this state, that the trust imposed the obligations of state law on the federal government, and that under section 8, state rather than federal law was determinative of water rights. (47 Cal.2d at pp. 626-629.) Accordingly, this court held the contractual provisions embodying section 5 invalid as inconsistent with Water Code section 22250.

The United States Supreme Court granted certiorari and reversed. The high court framed the issue

as whether or not section 8 allowed application of state law so as to nullify the specific and mandatory congressional directives of section 5. (357 U.S. at p. 290 [2 L.Ed.2d at p. 1325].) Expressly refusing to pass generally on the coverage of section 8 in the area of federal-state relations (*id.*, at p. 292 [2 L.Ed.2d at p. 1326]), the court ruled the specific provisions of section 5 governed the general provisions of section 8. (*Id.*, at p. 291 [2 L.Ed.2d at p. 1325]; *Nebraska v. Wyoming* (1945) 325 U.S. 589, 615 [89 L.Ed. 1815, 1830, 65 S.Ct. 1332].)

The Supreme Court's decision in *Ivanhoe* did not hold—as EBMUD now urges—that section 8 allowed application of state law only to define what constitutes a compensable property interest. The often cited statement, "As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein" (357 U.S. at p. 291 [2 L.Ed. 2d at p. 1325]), must be read in context. This statement is found in a paragraph which begins by pointing out this court's construction of section 8 rendered the application of state law absolute. The statement itself is prefaced by the court's comment, "We believe [the California Supreme Court's construction of section 8] erroneous *insofar as the substantive provisions of § 5 of the 1902 Act are concerned.*"

Ivanhoe fails also to support plaintiffs' and intervener's claim that section 8 permits the states to determine who may receive water from a federal

project and under what conditions. The Supreme Court expressly stated it was not passing generally on the coverage of section 8 (*id.* at p. 292 [2 L.Ed.2d at p. 1326]) and that it "need not determine whether a state could [by preventing state agencies from entering into contracts] frustrate the consummation of a federal project. . . . (*Id.* at p. 290 [2 L.Ed.2d at p. 1325])." *Ivanhoe* establishes that under section 8 inconsistent state law may not be applied to defeat a specific and mandatory congressional directive, expressly leaving open the broader questions argued by the parties before us.

Similarly, *City of Fresno* v. *California* (1963) 372 U.S. 627 [10 L.Ed.2d 28, 83 S.Ct. 996], fails to support the construction of section 8 urged by the parties. Like *Ivanhoe* it holds that state law may not be applied so as to defeat a specific and mandatory congressional directive. In addition, it extends the preemption doctrine by holding state laws preempted when they impair powers delegated to the administrator.

In *Fresno* the city sought a declaration it possessed prior right as well as statutory priority under state law to use water impounded by the Bureau for municipal and domestic purposes and that it was entitled to receive project water at the same rate charged for water delivered for irrigation.

The court held section 8 could not be applied to divest the United States of its eminent domain power. (372 U.S. at p. 630 [10 L.Ed.2d at p. 30].) The court pointed out that under section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. § 485h(c)) Congress had specifically prohibited contracts to supply municipal water unless the Secretary of the Interior determined the contracts would not impair the project's irrigation purposes. (*Id.* at p. 631 [10 L.Ed. 2d at p. 31].) The case holds that state law was preempted because of the eminent domain and delegated contract powers. The case is of no aid to plaintiffs and intervener.

Section 8 was not limited to merely allowing state law to define property interests as urged by EBMUD. The court's statement in *Fresno* that "the effect of § 8 *in such a case* is to leave to state law the definition of the property interests, if any, for which compensation must be made" (372 U.S. at p. 630 [10 L.Ed.2d at p. 31]; italics added) is not to the contrary. The above italicized language refers to cases involving the federal government's eminent domain power. (See *Ivanhoe Irrig. Dist. v. McCracken, supra,* 357 U.S. 275, 291 [2 L.Ed.2d 1313, 1325]; *U. S. v. Gerlach Live Stock Co., supra,* 339 U.S. 725.) The present case does not concern the federal government's eminent domain authority.

In the third United States Supreme Court case involving section 8, *Arizona v. California* (1963) 373 U.S. 546 [10 L.Ed.2d 542, 83 S.Ct. 1468], the court resolved a controversy among several states concerning their rights to use water from the Colorado River and its tributaries. The decision was governed by the provisions of the Boulder Canyon Project Act. (43 U.S.C. §§ 617-617t.)

Arizona arose against a background of aborted attempts by the several states to agree upon a division of the Colorado River watershed water through interstate compact. When the states were unable to agree, Congress responded by passing the Boulder Canyon Project Act. Section 5 of the act (43 U.S.C. § 617d) provides that the Secretary of the Interior is authorized to contract pursuant to regulations he may prescribe for the storage and delivery of water and that no person is entitled to the use of any water except by contract with the secretary. Section 8(b) of the act (43 U.S.C. § 617g(b)) states that any compact entered among the states would be "subject to all contracts, if any, made by the Secretary under section [5]. . . ."

In *Arizona* the argument was made that the secretary was obligated to apply the prior appropriation laws of the states in distributing project water. This argument was predicated on section 18 of the Boulder Canyon Project Act (43 U.S.C. § 617g) and section 8 of the Reclamation Act of 1902. Section 18 provides that the act shall not be construed as interfering with states' rights to adopt such laws as are deemed necessary concerning the appropriation, control, and use of waters within their borders. Section 8 of the general reclamation law was made applicable through section 14 of the Boulder Canyon Project Act (43 U.S.C. § 617m) by incorporation by reference.

The Supreme Court rejected this argument. Pointing out that the provisions of sections 5 and 8(b) gave supremacy to the secretary's contracts (373 U.S. at p. 580 [10 L.Ed.2d at p. 566]), the court held the general saving language of sections 18 and 8 could not be used to nullify the contractual power expressly conferred upon the secretary by section 5. (*Id.* at pp. 587-588 [10 L.Ed.2d at pp. 570-571].) The court noted the Boulder Canyon Project Act reflected, largely through section 5, the recognition by Congress of the need for unitary management and control of the multi-state water distribution system. It also pointed out that allowing too great a scope to state law would endanger the federal objectives. "Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow." (373 U.S. at pp. 589-590 [10 L.Ed. 2d at p. 572].)

Although *Arizona* differs from the instant case both because several states rather than only one were involved and because the secretary possessed broader powers than in the 1902 act, the Supreme Court's approach in interpreting section 8 and related sections is instructive. The court held that Congress preempts state laws not only when direct conflict exists but also when danger exists in that state law either interferes with the secretary's expressly delegated powers, frustrates operation of the project, or limits the benefits of the project.

Cases dealing with statutes similar to section 8 confirm that *Arizona* reflects the proper construction of the provision.

In *First Iowa Coop. v. Power Comm'n* (1945) 328 U.S. 152 [90 L.Ed. 1143, 66 S.Ct. 906], the State of Iowa sought the court's ruling that an applicant for a license from the Federal Power Commission (FPC) must, under federal law (16 U.S.C. §§ 802(b), 821), first comply with state law. Section 9(b), of the Federal Power Act (16 U.S.C. § 802(b)) requires an applicant, as a condition to obtaining a license, to submit satisfactory evidence of compliance with state law to the FPC. Section 27 (16 U.S.C. § 821), like section 8 of the Reclamation Act, provides that nothing in the act shall be interpreted so as to interfere with state laws concerning the control, appropriation, use or distribution of water.

The Supreme Court held federal law does not require compliance with state law as a condition precedent to securing a license. The court noted the state laws in question not only concerned the same matters Congress had committed to the discretion of the FPC but were also inconsistent with federal requirements. (328 U.S. at pp. 165-167 [90 L.Ed at pp. 1150-1151].) Under these circumstances, state law was held to have been preempted. The court reasoned that the application of state law would frustrate the congressional purpose of establishing a cooperative dual system of control by vesting two agencies—one state and one federal—with final authority over the same subject matter. *(Id.* at pp. 167-168 [90 L.Ed. at pp. 1151-1152].) The court pointed out the statutory scheme created a dual system of control allowing each agency final authority within its sphere of jurisdiction. *(Id.)*

Section 27 is intended to prevent supersedure of state law within the jurisdiction reserved to the states. *(Id.* at pp. 175-176 [90 L.Ed. at pp. 1155-1156].)

Another federal, statutory provision analogous to section 8 was construed in *Rice v. Chicago Board of Trade* (1946) 331 U.S. 247 [91 L.Ed. 1468, 67 S.Ct. 1160]. In *Rice* the petitioner sought a declaration the Board of Trade's rules relating to warehousing grain were invalid, not having been first submitted to the Illinois Commerce Commission for approval. The board—itself a state agency—argued the authority of the commission had been superseded by the Commodity Exchange Act. (7 U.S.C. § 1 et seq.) Section 4(c), of the federal act provided, "nothing in this section . . . shall be construed to impair any state law applicable to any transaction enumerated or described in such sections."

The court held the regulations of the Illinois Commerce Commission were superseded to the extent they were inconsistent with federal law. (331 U.S. at pp. 255-256 [91 L.Ed. at p. 1474].) This result was found required by section 4(c). The court reasoned that while section 4(c) left undisturbed nonconflicting state authority "supersedure was to take its natural course where rights not saved to the States were involved." *(Ib.* at p. 255 [91 L.Ed. at p. 1474].)

Insofar as both complaints attempt to invalidate the contract on the basis of its terms and conditions, the above principles require our finding preemption. As noted, they challenge both construction of Hood-Clay Connection and choice of diversion point. Plain-

tiff's complaint seeks rescission partially on the ground the EBMUD-Bureau contract will contribute to the likelihood the Bureau will complete development of the East Side Division, an integral part of the Central Valley Project specifically authorized by Congress. (43 U.S.C. § 616aaa et seq.)

The federal reclamation laws clearly establish that construction and maintenance water facilities are vested in the Bureau. (E.g., 43 U.S.C. § 390b(b) [projects constructed by Bureau of Corps of Engineers]; *id.* § 616aaa [Secretary of Interior to construct, operate, and maintain Central Valley Project, American River Division].) The determination of diversion point obviously concerns construction of the federal project. The location of the diversion point in fact comprises a substantial part of the federal project. Similarly, construction and location of the Hood-Clay Connection are clearly within the authority invested in the Secretary of the Interior and the Bureau. The allegations the EBMUD-Bureau contract will facilitate the Bureau's completion of the Central Valley Project on its face represents attempted interference with the Bureau's completion of a project Congress has directed it to undertake. Accordingly, we conclude that the complaint fails to state a cause of action insofar as it seeks invalidation of the contract on grounds that under state law construction of the canal or placement of the diversion point assertedly involve an unreasonable water use.

On the other hand, the cause of action seeking to compel EBMUD to reclaim waste water is not preempted by federal law. Nothing exists in the federal reclamation laws precluding parties contracting with the federal government from securing additional water from other sources.

WASTE WATER

In support of their causes of action to compel EBMUD to reclaim waste water, plaintiffs and intervener contend EBMUD's failure to reclaim contravenes the Water Reclamation Law (Wat. Code § 13500 et seq.), and violates article X, Section 2, of the California Constitution and Water Code section 100. However, we conclude the contention is not properly before us in this proceeding. Parties seeking to compel a user to reclaim waste water must, in the first instance, seek relief from the Regional Water Quality Control Boards, and having failed to do so are precluded from maintaining such cause of action against EBMUD.

Article X, section 2, provides in full: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The

right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. *This section shall be self-executing, and Legislature may also enact laws in furtherance of the policy in this section contained.*" (Italics added.) Water Code sections 100 and 101 are substantially the same as the constitutional provision.

The Legislature, consistent with its authority under article XIV, section 3, has established a thorough statutory system insuring reasonable water allocation and safeguarding water purity, commensurate in scope with the constitutional provision. (*Modesto Properties Co. v. State Water Rights Board* (1960) 179 Cal.App.2d 856, 860 [4 Cal.Rptr. 226].) The statutes vest the State Water Resources Control

Board (SWRCB) with full authority to "exercise the adjudicatory and regulatory functions of the state in the field of water resources." (Wat. Code, §174; *Johnson Rancho County Water Dist. v. State Water Rights Board* (1965) 235 Cal.App.2d 863, 867 [45 Cal.Rptr. 589].) It has been granted broad authority to control and condition water use, insuring utilization consistent with public interest. (Wat. Code, § 1257.) This authority includes protection of the environment. (*Id.*) The SWRCB's powers extend to regulations of water quality and prevention of waste. (E.g., Wat. Code, §§ 100, 275.) It has adopted administrative regulations to prevent waste and unreasonable use. (Cal.Admin.Code, tit. 23, §§ 764.10-764.13.)

The Legislature enacted the Water Reclamation Law to encourage waste water reclamation as a means of supplementing existing water supplies. (Wat. Code, §§ 13510-13512.) The law directs the Department of Health and the SWRCB—through its subdivisions the Regional Water Quality Control Boards—to regulate reclamation and use of waste water.

The Department of Health is charged with responsibility for establishing statewide reclamation criteria as the basic governing standard to insure public health and safety in view of the hazards attendant in waste water reclamation. (Wat. Code, §§ 13520-13521.) In addition to statewide criteria, the regional boards, in consultation with the Department of Health, are directed to promulgate water reclamation requirements. Water reclamation requirements must

include or be consistent with the statewide reclamation criteria and may be imposed on the reclaimer, user, or both. (Wat. Code, § 13523.)

Following establishment of criteria, reclamation or use of waste water is prohibited until the regional boards promulgate reclamation requirements or determine no requirement is necessary. (Wat. Code § 13524.) Any person reclaiming or proposing to reclaim, or using or proposing to use reclaimed waste water in any region governed by reclamation criteria is required to file a verified report with the regional board. This report must contain information required by the regional board. (Wat. Code, § 13522.5.) The regional boards may also require submission of preconstruction reports. (Wat. Code, § 13523.)

The law provides both criminal and injunctive sanctions to insure enforcement. Any person using reclaimed waste water after establishment of criteria, but prior to promulgation of reclamation requirements, is guilty of a crime. (Wat. Code, § 13526.) Similarly, violation of reclamation requirements subjects the violator to criminal penalties. (Wat. Code, § 13525.5.) Failure of a party to file a report containing the information deemed necessary by the regional board constitutes a crime. (Wat. Code, § 13522.6.) The Attorney General must, upon request by the regional board, seek injunction or other relief to compel any person to promptly file a report (Wat. Code, § 13522.7), or to prohibit any person from violating the law's provisions. (Wat. Code § 13525.) Finally, the Department of Health or any local health

officer is required to abate reclaimed waste water use causing contamination. (Wat. Code, § 13522.)

The statutory pattern clearly reflects the Legislature's intent to vest regulation of waste water reclamation in the administrative agency.

Due to the danger to public health and to the problems of feasibility connected with waste water reclamation, the statutory provisions prohibit use of reclaimed waste water until the Department of Health establishes statewide criteria and the regional boards establish reclamation requirements. The careful consideration demanded by the Legislature prior to permitting reclamation of waste water is evidenced by its decision to make violations of its statutes criminal. The broad powers given to boards toward obtaining injunctions and enforcing compliance with adopted criteria and requirements also reflect legislative intent to vest regulation of waste water reclamation in the boards.

The SWRCB is exercising those powers. It has recently required a public utility to demonstrate the utility's study and conclusions concerning waste water reclamation. (Order 76-12.) SWRCB is now developing policies and plans for waste water reclamation throughout the state. (Cal. State Water Resources Control Board, Policy and Action Plan for Water Reclamation in Cal. (Draft, Dec. 1976).) And, through its regional boards, and in conjunction with the Department of Health, it is the responsible agency for regulating and controlling waste water reclamation. (Wat. Code, § 13500 et seq.)

Permitting our superior court's concurrent jurisdiction in this difficult area would impair the comprehensive administrative system established by the Legislature to guarantee reasonable water use and purity. The scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity present to the courts. What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes. As this court noted in *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 140 [60 Cal.Rptr. 377, 429 P.2d 889], "what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved *in vacuo* from statewide consideration of transcendent importance."

The question whether available economic resources should be devoted to waste water reclamation or development of other water supplies is basically a legislative one. The necessity of considering the entire circumstances is obviously increased when, as here, a court is called upon to adjudicate the reasonableness of a decision not to reclaim waste water in the context of a long term procurement of water supplies for over a million people. The issues are far more complex and different both in kind and degree from those presented when a court adjudicates only between two competing users. (E.g., *Joslin v. Marin Mun. Water Dist., supra,* 67 Cal.2d 132 [reasonableness of municipal water supply as opposed to availability of sand, gravel, and rock]; *Peabody v. City of Vallejo* (1935)

2 Cal.2d 351 [40 P.2d 486] [reasonableness of municipal use versus water flow over land to deposit silt and wash out salt deposits].) The matter is still further complicated when, as here, transcendent interests of public health and safety beyond normal water use are involved.

When as in the instant case the statutory pattern regulating a subject matter integrates the administrative agency into the regulatory scheme and the subject of the litigation demands a high level of expertise within the agency's special competence, we are satisfied that the litigation in the first instance must be addressed to the agency. (See Jaffe, Judicial Control of Administrative Action (1965) p. 121 et seq.) Plaintiff's and intervener's contentions concerning waste water reclamation must be addressed in the first instance to the appropriate regional board.

The judgment is affirmed.

Tobriner, Acting C.J., and Kaus, J.,* concurred.

RICHARDSON, J.—I concur in the judgment, with some misgivings.

First, I fully agree with the majority's disposition of plaintiff's cause of action to compel EBMUD to reclaim waste water to supplement existing supplies. As the majority holds, although that cause is not preempted by federal law, it is appropriate to require plaintiffs to seek relief from the Regional Water

*Assigned by the Chairperson of the Judicial Council.

Quality Control Board before pursuing their judicial remedies.

I have considerably less confidence, however, in the majority's holding that plaintiffs' cause of action to invalidate EBMUD's contract with the Bureau of Reclamation is preempted by the federal Reclamation Act. Were we considering this case afresh, without the benefit of the various preemption decisions of the United States Supreme Court discussed and relied on by the majority, we might well reach a different conclusion. Plaintiffs have alleged that the construction of the Hood-Clay Connection, and the placement of the diversion point on the Folson-South Canal above its intersection with the Hood-Clay Connection, will result in an unreasonable use or diversion of water from the lower American River, in violation of express constitutional and statutory provisions (Cal. Const., art. X, § 2; Wat. Code, § 100) and with very serious environmental consequences. Nothing in the federal act expressly calls for a preemption of such fundamental provisions of state law; indeed, as the majority acknowledges, the language of the act arguably would support a contrary holding.

Thus, were we writing upon a clean slate, we might reasonably determine that state laws regarding water use and diversion must control despite the fact that a federal project is involved. After all, the project at issue was intended to afford improved water distribution facilities for *California* users, and it seems somewhat anomalous to hold that such a local project is exempt from state laws aimed at promoting reasonable water use for California citizens.

Nevertheless, the majority's analysis of the applicable decisions by the United States Supreme Court indicates that preemption will occur whenever application of state law could frustrate the operation of a federal project, or circumscribe the authority of federal officers responsible for administering the project. As the majority explains, plaintiffs' suit herein seeks to rescind the federal contract and enjoin construction of the proposed facilities, thereby, arguably, frustrating or defeating a federal purpose. Under such an analysis of the preemption decisions plaintiffs' action must be dismissed.

I note, however, that although the preemption decisions may be instructive, they are not directly on point—no decision of the United States Supreme Court has as yet adopted any ironclad, unequivocal rule which would invoke the preemption doctrine whenever operation of a federal project may be threatened by application of state law. Consequently, although I concur in the judgment herein, given the present uncertainties in the applicable decisions, I fully acknowledge that a definitive opinion on this difficult subject must come from the high court.

Mosk, J.—I dissent.

This case comes to us at the pleading stage, a general demurrer having been sustained without leave to amend. Our task is to ascertain whether any cause of action in the complaint, liberally construed, states facts indicating plaintiffs are entitled to some relief. (*Selby Realty Co. v. City of San Buenaventura*

(1973) 10 Cal.3d 110, 123 [109 Cal.Rptr. 799, 514 P.2d 111].) The majority decide this case by declaring, as a matter of law, that defendants have valid defenses. I would hold that the pleadings justify giving plaintiffs and the County of Sacramento their day in court.

I

It is incongruous for EBMUD, a creation of the state, to insist upon a right to violate state water laws simply because of a contrived conflict with the source from which it chooses to purchase water. I submit that an agency dependant upon the State of California for its existence cannot voluntarily undertake to buy water from a federal bureau and then set up as a defense to the alleged impropriety of its actions a claim that state law is not applicable to its decision to enter into the transaction.

The problem of preemption is not unduly complicated. If any agency were to attempt to place in issue, or to dictate to a federal bureau, the terms which the latter may impose as to the quantity, price, site or other conditions for the sale of water from a federal project, undeniably there would be preemption and federal law would prevail. (*Ivanhoe Irrig. Dist. v. McCracken* (1958) 357 U.S. 275 [2 L.Ed.2d 1313, 78 S.Ct. 1174].) But that is not involved here. The plaintiffs, and the County of Sacramento as intervener, do not seek to impose their will on or to challenge the federal government, but merely to hold a state-created agency accountable under state law for whether and to what extent it may initiate a contract

to purchase waer. Under these circumstances there is no federal-state controversy which invokes the doctrine of preemption. The only conflict here is between the plaintiffs and the County of Sacramento on the one hand and a state-created agency on the other as to the propriety of action taken by the latter.

Defendants rely upon a series of Supreme Court decisions (*City of Fresno v. California* (1963) 372 U.S. 627 [10 L.Ed.2d 28, 83 S.Ct. 996], *Dugan v. Rank* (1963) 372 U.S. 609 [10 L.Ed.2d 15, 83 S.Ct. 999], and *Ivanhoe Irrig. Dist v. McCracken, supra,* 357 U.S. 275), to support the proposition that since EBMUD will be buying federal water, federal and not state law applies to the transaction of purchase. That broad principle is correct, but in this context it is a non sequitur.

The plaintiffs do not challenge the validity or terms of the executed contract with the federal bureau. They complain that EBMUD improperly initiated the contract in the first instance because it does not need American River water, and that even if there is a need it should seek a point of diversion closer to home in order to afford multiple use—recreational, fishing, wildlife, as well as municipal and industrial—of American River water.

The assault is not upon the federal contract per se but upon the decision of EBMUD to obtain a supplemental supply of water and to seek it by the means proposed. Thus for plaintiffs to prevail they must show only that EBMUD's original decision to proceed, under the facts alleged and to be proved, violates state

law. Validity of the terms and conditions of the ultimate federal contract, which undeniably is controlled by federal law, is irrelevant to the issues framed by the complaint.

II

Even if, arguendo, we accept the faulty premise of the majority that federal law should apply to the problem before us, the applicable federal provisions refer directly back to state law, somewhat in the nature of a renvoi. The Auburn-Folsom South Unit of the Central Valley Project was authorized by an act of Congress enacted in 1965 (43 U.S.C. §616aaa et seq.). While construction was to be undertaken pursuant to federal reclamation laws, the Secretary of the Interior was directed to allocate water "in accord with state water laws" (Auburn-Folsom South Act, §5, 43 U.S.C. §616eee).

Legislative history confirms this intent of Congress. In relevant part the Committee on Interior and Insular Affairs issued a report on the project which declared: "The committee's decision [to include the section] was based on the fact that the Auburn-Folsom South project is a wholly intrastate project, with the waters of the American River arising wholly in the State of California and their use and disposition being wholly in the State of California. Therefore, the committee was of the opinion that the laws of the State of California with respect to allocation of water should be followed by the Secretary of the Interior, including the provisions assuring protection to counties and areas of origin. Furthermore, the committee's action simply retains the effect of basic Central Valley project legislation and is consistent with past practices." (Sen. Rep. No. 1289, 88th Cong., 2d Sess. (1964) pp. 3-4.)

While the act was not passed until the following year, at which time the Secretary of the Interior attempted unsuccessfully to persuade Congress to delete section 5 and its reliance upon state law, the measure was enacted in the originally recommended form.

Subsequent congressional acts give strong indication of the continuing intent to preserve the environment and in the quest to do so to yield to the states. Thus the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. § 4331) refers to the "policy of the Federal Government, in cooperation with state and local governments, . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony."

The Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1251(b)) are even more precise: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act." The amendments also give the highest order of priority to "the reclamation of wastewater" (33 U.S.C. § 1281(d)(3)).

Thus it seems abundantly clear that in this sensitive field of environmental protection, not only does no conflict emerge between federal and state policy, but the federal government has indicated a decided prefrence to defer to "the primary responsibilities and rights of States."

It should be apparent that the primary responsibilities and rights of California apply particularly to the American River, which is an entirely intrastate stream rising from its source in the Sierra Nevada Mountains and flowing southwestward to the City of Sacramento where it joins the Sacramento River. The American River has traditionally been utilized by the public as a scenic, sporting and recreational resource. Within recent years the County of Sacramento has acquired 2,000 acres of land along both banks of the river as an open-space green belt for recreational and scenic purposes.

Consistent with state preeminence over the intrastate stream, in 1970 when the State Water Resources Control Board issued appropriation permits to the federal Bureau of Reclamation for the Auburn-Folsom South Unit, it reserved jurisdiction to determine and prescribe minimum flows to be maintained in the American River for fish, wildlife and recreational purposes. Again in 1972, the State Water Resources Control Board ordered a minimum flow of 800 to 1,250 cubic feet of water per second for protection of fish and wildlife. That the state was prescribing the flow of water from a federally constructed project did not appear to raise any spectre of federal preemption.

The EBMUD contract involved here will directly affect that same flow of water.

EBMUD will take delivery of the new supply from the Folsom South Canal. Since the water will be diverted from the canal, it will not be available to flow down the Lower American River, that section directly upstream of its joinder with the Sacramento River. It is plaintiffs' contention that if the supply were to be diverted from the Sacramento River below the confluence of the American River, the water could be released from Folsom and Nimbus Dams, flow down the American River where it could be used for fish, wildlife and recreational purposes, and then be diverted by EBMUD, if indeed EBMUD needs additional water.

Plaintiffs' contentions find support in an official decision of the State Water Resources Control Board which criticized the choice by EBMUD of the Folsom South Canal as the point of diversion. It emphasized that the upstream rather than downstream delivery will constitute a deprivation of the possibility for multiple beneficial use of the water which EBMUD will purchase, and in effect deprive the American River of the equivalent of 210 cubic feet per second of flow.

III

If we apply state law originally, or as in a renvoi the federal law which refers back to state law, we must consider relevant provisions of California law.

As indicated above, EBMUD is a local public agency of the State of California, organized under the Municipal Utility District Act. (Pub. Util. Code, § 11501 et seq.) A local agency may exercise only such powers as have been authorized by the laws of the state. (*Irwin v. City of Manhattan Beach* (1966) 65 Cal.2d 13, 20 [51 Cal.Rptr. 881, 415 P.2d 769].) Its very being and the extent of its authority is dependent upon the Legislature and limited by the provisions of the California Constitution. (*State of California v. Marin Mun. W. Dist.* (1941) 17 Cal.2d 699 [111 P.2d 651].) Thus the contractual powers of EBMUD must be determined exclusively by reference to the legislation under which it exists and to relevant constitutional provisions. (*Stimson v. Allessandro Irr. Dist.* (1902) 135 Cal. 389, 392 [67 P. 496, 1034]. If a contract entered into by EBMUD violates a California constitutional principle, the contract exceeds the agency's powers and is void. (*Allen v. Hussey* (1950) 101 Cal.App.2d 457, 472 [225 P.2d 674]; *County of Alameda v. Ross* (1939) 32 Cal.App.2d 135, 146 [89 P.2d 460].)

Article X, section 2, of the California Constitution is the dispositive provision of our law. In a self-executing section, the Constitution requires "that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable method of use or unreasonable method of diversion of water. . . ."

For added emphasis the Legislature has enacted similar provisions in Water Code section 100. This section, together with the explicit constitutional restriction, comprise the basic tenets governing water distribution in California, a subject that has given rise to scores of controversies since Gold Rush days.

The fundamental water law of California was succinctly outlined by this court in *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367 [40 P.2d 486]:

"1. The right to the use of water is limited to such water as shall be reasonably required for the beneficial use to be served.

"2. Such right does not extend to the waste of water.

"3. Such right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

"4. Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution.

"The foregoing mandates are plain, they are positive, and admit of no exception. They apply to the

use of all water, under whatever right the use may be enjoyed."

Application of the *Peabody* inhibitions in particular factual contexts is inevitably subject to fluctuating determinations. Certainly it does not lend itself to straitjacket dispositions as a matter of law.

As stated in *People* ex rel. *State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 750 [126 Cal.Rptr. 851]: "it seems evident that the overriding principle governing the use of water in California is that such use be reasonable. However, as repeated on innumerable occasions, what is reasonable use or reasonable method of use of water is a question of fact to be determined according to the circumstances in each particular case. [Citations.]" And, as observed in *Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 567 [45 P.2d 972]: "What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time." To the same effect are opinions of this court in *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 139 [60 Cal.Rptr. 377, 429 P.2d 889]; and *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 706 [22 P.2d 5].

Since the law of California is so crystal clear that reasonableness of use, reasonableness of methods of diversion and prevention of waste are questions of facts under the circumstances of each case, the majority fall into grievous error in deciding the issues herein as a matter of law. I would give these plaintiffs an opportunity to prove their allegations before a trier of fact.

IV

Finally, with regard to the cause of action relating to failure of EBMUD to recycle wastewater, it is remarkable that the majority lean on a theory that relief must be sought from Regional Water Quality Control Boards. For more than a century it has been deemed elementary that this court will refuse to consider issues not raised by the parties below. (*Parkside Realty Co. v. MacDonald* (1913) 166 Cal. 426, 432 [137 P. 21]; *Duff v. Fisher* (1860) 15 Cal. 375, 381; *Lotts v. Board of Park Commrs.* (1936) 13 Cal.App.2d 625, 636 [57 P.2d 215].) None of defendants' demurrers in this action invoked a jurisdictional contention, or a claim that administrative remedies had not been exhausted. The trial court's memorandum opinion made no reference to that doctrine as a basis for its judgment. None of the defendants raised the point in the Court of Appeal, and even here their contention was merely that this complex water problem is more legislative than judicial in substance. The administrative remedy issue should not have been considered by this court, and certainly not employed as the foundation for an opinion.

I would reverse the judgment and send the matter back to the trial court for a full hearing on the merits.

(20 C.3d 652a)

In the Supreme Court
of the
State of California

S. F. No. 23,422

[Modification* of opinion (20 Cal.3d 327, ... Cal. Rptr. ....., ... P.2d .....) on denial of petition for rehearing.]

Environmental Defense Fund, Inc., et al.,
Plaintiffs and Appellants,

vs.

East Bay Municipal Utility District, et al.,
Defendants and Respondents;

County of Sacramento, a political subdivision of the State of California,
Intervener and Appellant.

[Filed Feb. 23, 1978]

THE COURT.—The opinion herein, appearing at 20 Cal. 3d 327, is modified as follows:

On page 341, line 8 of the first paragraph, the words "Regional Water Quality Control Board" are

*This modification requires the following editorial changes in headnotes (4a-4e) and (5): Headnote (4a-4e), page 329, lines 4 and 5, delete "Regional Water Quality Control Boards," and insert "State Water Resources Control Board (SWRCB)," and on page 330, lines 1 and 2, delete "appropriate regional water quality control board," and insert "SWRCB." Headnote (5), page 330, lines 6 and 7, delete "and its subdivisions, the Regional Water Quality Control Boards," and insert a period in its place.

changed to "State Water Resources Control Board (SWRCB)."

On page 342, line 3, delete the words "State Water Resources Control Board" and the parens around SWRCB.

On page 342, the second sentence of the first full paragraph is deleted and the following added in lieu thereof: "The Department of Health, the Regional Water Quality Control Boards, and the SWRCB regulate reclamation and use of waste water. (Wat. Code, §§ 13320, 13510-13512.)"

On page 343, line 2 of the second paragraph, the word "agency" is changed to "agencies."

On page 343, the last full sentence and the citation are deleted.

On page 344, line 8 of the second full paragraph, change the words "appropriate regional board" to "SWRCB."

RICHARDSON, J.—The concurring opinion herein, appearing at 20 Cal.3d 345, is modified as follows:

On page 345, line 6, the words "Regional Water Quality Control Board" are changed to the words "State Water Resources Control Board."

MOSK, J.—The dissenting opinion herein, appearing at 20 Cal.3d 346, is modified as follows:

On page 352, lines 3 and 4 of the second full paragraph, the words "Regional Water Quality Control Boards" are changed to the words "State Water Resources Control Board."

Appendix B

(125 Cal.Rptr. 601)

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 33,624

As Modified on Denial of Rehearing
Dec. 5, 1975.
Hearing Granted Feb. 26, 1976.

Environmental Defense Fund, Inc., et al.,
Plaintiffs and Appellants,
vs.
East Bay Municipal Utility District, et al.,
Defendants and Respondents,
County of Sacramento, a political subdivision of the State of California,
Intervener and Appellant.

[Nov. 7, 1975]

OPINION

LAZARUS, Associate Justice*

*Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

Plaintiffs and appellants in this suit involving the interpretation of the basic water law of California are several nonprofit corporations dedicated to protecting and preserving the natural environment, joined by three individual plaintiffs. The latter are taxpayers and property owners within the area served by respondent East Bay Municipal Utility District.[1] The utility district (hereinafter EBMUD) is the second largest distributor of water in the Western United States. The other respondents are its directors and its general manager. The intervenor, County of Sacramento, has for the past 13 years been in the process of developing a 2,000-acre green belt for scenic and recreational purposes along both banks of the lower American River.

Appellants brought this action for declaratory, mandatory and injunctive relief after EBMUD entered into a contract with the U. S. Bureau of Reclamation for the purchase of water to be diverted from the upper American River when the Auburn-Folsom unit of the Central Valley Project, now under construction by the federal government, is completed. EBMUD, which now gets most of its water from the Mokelumne River, insists that this supplemental water supply will be urgently needed by 1985 to meet its anticipated future requirements.

[1]Originally, there were four individual plaintiffs and appellants. The appeal as to appellant Gerald Meral has been dismissed. Filing briefs as amicus curiae in support of appellants are the Attorney General of the State of California and the Goleta County Water District. The Association of California Water Agencies filed an amicus curiae brief in support of respondents.

Plaintiffs and intervenor contend that this threatened diversion of water would substantially diminish the free flow of the lower American River to the extent that it would, inter alia, destroy all wildlife in the area, render it useless for boating, fishing and other recreational opportunities, and add to the pollution of San Francisco Bay. The trial judge sustained general demurrers to the first amended complaint and to the complaint in intervention without leave to amend. This appeal is from the judgments entered in favor of respondents pursuant to the foregoing orders.

It comes before us, therefore, as a pleading case in which the moving parties assert that the fundamental law for conservation of this state's water resources as expressed in the first two sentences of article XIV, section 3 of the California Constitution and its statutory counterpart, Water Code section 100[2] entitles them to the kind of relief that they are seeking. The constitutional provision, in effect since 1928, is by its terms self-executing and states: "Sec. 3. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be

[2]Article XIV, section 3 of the Constitution is codified in Water Code section 100, which consists of the first two sentences in section 3. The remainder of the language used in section 3 is codified in Water Code section 101.

exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

All parties agree that the erudite trial judge gave a complete and accurate description of the parties, their pleadings, the factual allegations, and the issues resulting therefrom, in the opinion incorporated in and made part of his decisions. Since we deem it unnecessary to attempt to gild the lily, we therefore adopt the following excerpts:

"A. *The Complaint*

"1. *The plaintiffs.* Plaintiffs are three organizations and four individuals. Plaintiff *Environmental Defense Fund* is a nationwide nonprofit membership corporation, with many members in Alameda and Contra Costa Counties. It is a New York corporation with an office in Berkeley, California. Among its purposes is the protection of the natural environment, including rivers. It has brought numerous suits throughout the country and is suing here on its behalf as well as on behalf of its members.

"Plaintiff *Oceanic Society* is a California nonprofit corporation. It has a particular interest in the preservation of San Francisco Bay's aquatic environment by means of waste water recycling. Plaintiff *Save the American River Association* is a California nonprofit membership corporation, formed to protect the lands adjacent to the lower American River and the quantity and quality of its flow.

"The individual plaintiffs are all taxpayers and either homeowners or renters in Alameda or Contra Costa Counties, within the service area of defendant East Bay Municipal Utilities District (hereinafter EBMUD). Three are members of plaintiff Environmental Defense Fund; all have an interest in the preservation of San Francisco Bay and are concerned with the pollution of the Bay; three have made recreational use of the American River, one especially has kayaked extensively on parts of the river that would be inundated under present plans.

"2. *The defendants.* EBMUD is a utility district supplying water to large portions of Alameda and Contra Costa Counties. It also engages, through its Special District One, in some treatment of waste water. Defendant Harnett is EBMUD's general manager.

"3. *Factual allegations.* Plaintiffs set forth the facts upon which they rely with unusual lucidity. In summarizing them, I will, for the sake of simplicity, avoid repeated use of the word 'alleged.' Plaintiffs charge:

"EBMUD supplies water to over a million people in Alameda and Contra Costa Counties, at an average rate of 212 million gallons a day. EBMUD gets must of the water from the Mokelumne River to which it holds rights to 325 million gallons a day. EBMUD organized and controls Special District Number One which operates a sewage treatment plant. This plant gives waste water only 'primary treatment' and discharges the effluent into San Francisco Bay.

"EBMUD has decided that by 1985 water from the Mokelumne will no longer be sufficient to meet the anticipated water needs of the people in the district. It began a wide-ranging search for additional water. As part of the search, it signed an agreement in 1968 with the U. S. Bureau of Reclamation and other parties. This agreement looked toward getting water from the American River and in it EBMUD agreed to certain conditions if it should later contract with the Bureau for water from the Bureau's American River Division of the Central Valley Project. One

condition makes EBMUD responsible for a construction of a canal, known as the Hood-Clay Connection, if federal and state authorities do not build it and if the Bureau finds it to be necessary. The canal is an integral part of the proposed East Side Division of the Central Valley Project. The agreement commits EBMUD to actively support congressional authorization and federal construction of the East Side Division, including the Hood-Clay Connection.

"This initial agreement was followed by a contract signed in 1970 between EBMUD and the Bureau. EBMUD agreed to buy certain increasing quantities of water as soon as it becomes available upon completion of the Auburn-Folsom-South Project on the American River. The water will be diverted from the Folsom-South Canal at a point above the intersection of the canal and the proposed Hood-Clay Connection and thus will not be available to flow down the lower American River.

"In contracting for American River water, EBMUD did not recognize its legal obligation to embark on a waste-water reclamation program. EBMUD has decided not to develop reclamation facilities to assist in meeting its present or future water needs. This decision as well as the seeking of additional water from the American River are abuses of discretion. The American River water will cost consumers more than reclaimed water. In addition, EBMUD has made 'a major contribution . . . to the likelihood that the Bureau will (a) complete its construction of the Auburn-Folsom-South Project and (b) undertake

construction of the East Side Division.' These two endeavors will have serious harmful environmental consequences specified in the complaint, among them the destruction of the free-flowing north and middle forks of the American and the reduction of flow on the lower American, with the attendant loss of boating, fishing and other recreational opportunities. EBMUD will also continue to pollute the Bay with resulting environmental damage.

"4. *Causes of Action.* These allegations give rise to three asserted causes of action. The first is that EBMUD's decision not to develop water reclamation facilities violates Article XIV, Section 3 of the California Constitution, Water Code Section 100 and Water Code Sections 13500 et seq.[3] The second is that EBMUD's decision to seek water from the American River violates the same provisions. The third is that the two decisions in combination contravene these provisions.[4]

"5. *Relief sought.* Plaintiffs seek a declaration that the two decisions are illegal, an order requiring EBMUD to use its best efforts to rescind the 1970 contract, an order forbidding EBMUD from issuing bonds or raising funds to construct facilities for transmission and distribution of water from the American River, and an order requiring defendants

[3]The trial judge found that appellants could not state a cause of action based on Water Code section 13500 et seq., and appellants have apparently conceded on this appeal that they could not rely on these provisions to support a claim for relief.

[4]Since the latter is a hybrid count that exists, if at all, only if the two prior counts are both held to state valid causes of action, it need not be discussed independently here.

'to undertake such a reclamation program as the proof will determine is required by law'.

"6. *Previous ruling.* This court previously sustained a general demurrer to the complaint with leave to amend.

"B. *The Complaint in Intervention*

"Intervenor is the County of Sacramento. The county alleges: The American River is the second largest tributary of the Sacramento. The lower American, running 23 miles from Nimbus Dam to the Sacramento, lies wholly within Sacramento County. The lower American has long been used by the public for a variety of scenic and recreational purposes, including boating, fishing and swimming.

"Beginning in 1962, the county developed the American River Parkway Plan. Pursuant to it, the county acquired 2000 acres of land on both sides of the lower American in order to develop a greenbelt for recreational and scenic purposes along the river. The areas covered by the plan will become a regional park; they will be improved in ways specified by the complaint and will cover the equivalent of twelve square miles. The county has already expended over six million dollars for land acquisition and improvements under the plan and expects to spend a million to 1½ million dollars a year in the future.

"After outlining EBMUD's agreements with the United States pertaining to the Auburn-Folsom-South Project, the county avers that this project will involve the construction of a dam at Auburn above

Folsom Dam and the construction of a canal, the Folsom South Canal, above Nimbus Dam. The Auburn Dam and Folsom South Canal are presently under construction and, when completed, will divert water from the lower American. EBMUD's part of this diversion will be up to 150,000 acre feet per year or about 133 million gallons a day.

"The county then states on information and belief that EBMUD could have contracted with the United States to get sufficient water at least as efficiently and economically from the Sacramento River at or below its confluence with the lower American.

"The county next pleads a 1972 decision of the California Water Resources Control Board (Decision 1400). This decision made certain specified findings as to optimum and minimum water flows needed in the lower American for the protection of fish and wildlife and for recreational purposes. The decision orders certain minimum flows below those necessary to provide optimum conditions for fish and wildlife maintenance and recreational purposes and provided for the reduction of such flows below those ordered whenever water supplies are inadequate to meet irrigation needs. The county avers that as more and more water is provided for irrigation and other purposes by the Auburn-Folsom-South Project, the lower American will not have sufficient water to maintain fish and wildlife and to use the river for recreation.

"The county's complaint also quotes from the Water Board decision, as follows: [¶] 'The Bureau contract with East Bay Municipal Utility District provides

for delivery of water through the Folsom South Canal rather than from a downstream location. This type of water development, while satisfying one water requirement, eliminates the possibility for multiple beneficial uses of the water, and is not sound management of the water resource. If the Bureau contract with the District had required that the District take delivery of project water from the Sacramento River or some other downstream location rather than the Folsom South Canal, an additional 150,000 acre feet of project water supply (equivalent to about 210 cfs of continuous supply) would have been available for stream flow augmentation below Nimbus for fish and recreational purposes prior to ultimate use for municipal purposes. To this extent, the decrease in diversion via Folsom South Canal resulting from increased minimum flows below Nimbus Dam would be eliminated if EBMUD's point of delivery were made from the Sacramento River.'

"Claiming irreparable injury, the county seeks a declaration that EBMUD 'lacked legal capacity to enter into' the 1970 contract and an injunction restraining the defendant from furthering its execution and either ordering it to seek rescission through court action or declaring the contract void. . . .

"C. *The first amended complaint*

"The first amended complaint, also before us at this time, repeats by reference all of the charging allegations of the original complaint and also incorporates the allegations of the complaint in intervention pertaining to the lower American, its recreational use,

the American River Parkway Plan, the availability of Sacramento River water to meet EBMUD needs and the decision of the California Water Resources Control Board. The amended complaint seeks the same relief on the same legal theories as the original complaint."

To recapitulate—plaintiffs' claims are essentially that EBMUD's contemplated activities come within the purview of the constitutional ban on misuse of the state's water resources for the following reasons:

1. EBMUD's decision not to recycle or reclaim its waste water is an unreasonable and profligate wasting of water, and that its existing water supplies are therefore not being "put to beneficial use to the fullest extent of which they are capable." If it husbanded its available water resources, it would have relatively little need to look elsewhere.

2. By unreasonably threatening to divert their supplemental supply from an upstream rather than a downstream location, EBMUD will prevent multiple beneficial use of the waters of the lower American River for recreational and other purposes, thereby making it an "unreasonable method of use or unreasonable method of diversion of water."

Respondents' demurrer to the first amended complaint was directed to the pleading as a whole.[5] It did

[5]The demurrer to the first amended complaint asserted by respondents reads: "COMES NOW Defendants, EAST BAY MUNICIPAL UTILITY DISTRICT, its General Manager, and each of its Directors named herein, and demurs to the First Amended Complaint on file herein on the ground that said complaint fails to state facts sufficient to constitute a cause of action against Defendants."

not attack any of its counts separately. Hence, the judgment of dismissal can be affirmed only if none of the counts of the first amended complaint state facts sufficient, if accepted as true, to establish a legal theory that would entitle plaintiffs to relief. (*Warren v. Atchison, T. & S. F. Ry. Co.* (1971) 19 Cal.App. 3d 24, 29, 96 Cal.Rptr. 317; see also 3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 804, p. 2416, and the authorities cited.)

Initially, however, in order to determine whether plaintiffs have indeed asserted any justiciable cause of action, the threshold question with which we are called upon to decide is as to the reach and scope of the constitutional mandate. For, of course, none of the contemplated acts or omissions of EBMUD could be said to be a constitutionally prohibited use of the state's water resources if we are to agree with respondents that this sovereign enactment for the control of the state's water resources was meant to apply only to the kind of disputes over water claims between private parties that existed at the time article XIV, section 3, was adopted.

IS PRESERVATION OF THE ENVIRONMENT AMONG THE INTERESTS COMING WITHIN THE PROTECTION OF ARTICLE XIV, SECTION 3 OF THE CONSTITUTION?

Article XIV, section 3, respondents say, has its roots in the law of real property. They therefore insist that its evolution is such that it was only meant to modify the rule followed in the 1926 *Herminghaus* case (*Herminghaus v. South. California Edision Co.*

(1926) 200 Cal. 81, 252 P. 607) with respect to competing claims to *property rights* in water. They maintain that the fact that all water litigation since the enactment of article XIV, section 3, two years later, has so far involved traditional property claims to water between riparian owners and appropriators, or between prior and subsequent appropriators, or between competing riparian users, gives support to this view.

Appellants, on the other hand, assert that the constitutional provision was adopted as a general welfare measure to conserve California's rapidly diminishing water resources for the benefit of the public at large. It is therefore their contention that the constitutional mandate must be broadly construed to encompass all rights to the beneficial use of the rivers and streams of this state, including those of sportsmen and others who are still able to find opportunities to enjoy outdoor recreation.

The question as to whether or not claims of the kind here involved come under the umbrella of article XIV, section 3, is now therefore squarely before an appellate tribunal for the first time. The fact that it is one that the courts have not heretofore been called upon to determine is understandable, since it has only been in the last few years that the population explosion and our unprecedented urban expansion have created the environmental problems that have been responsible for the recent development of a vast new source of litigation. We begin our analysis, therefore, from a historical perspective.

Water has, of course, always understandably been regarded by the inhabitants of this state as one of our most precious commodities.[6] "The conservation of other natural resources is of importance, but the conservation of the waters of the state is of transcendent importance. Its waters are the very life blood of its existence." (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 702, 22 P.2d 5, 16.)

The historical background of our water decisions, noted in the appellate reports for their bulk as well as their quality, has been admirably summarized in the opinion of the trial judge; also, in the Supreme Court's opinion in *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 136-138, 60 Cal.Rptr. 377, 429 P.2d 889, a case that will be more appropriately discussed elsewhere in this opinion. Without detailed discussion here, we observe that the decisions prior to the adoption of the constitutional amendment tended to keep pace with the changing conditions that came about with the growth of our state. First, in the "gold rush" phase of our development, the courts were concerned mainly with the claims of those who were diverting water from the public domain for mining purposes. Then, when agriculture became the predominant economic activity, the courts became largely preoccupied with litigation over riparian rights.

Thus, beginning with *Lux v. Haggin* (1886) 69 Cal. 255, 4 P. 919, California case law in its earlier stage

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[6]Recognition of the vital need for water as a life-sustaining force is as old as civilization itself. "Water is the best of all things." It was Pindar who said it in 475 B.C.

of development, adhered to the rule "that in a controversy between a riparian owner and an appropriator the doctrine of reasonable use does not apply." (*Gin S. Chow v. City of Santa Barbara, supra,* 217 Cal. 673, at p. 696, 22 P.2d 5 at 14.) As between riparian owners, each was limited to a reasonable use of the water. But, "As against an appropriator who seeks to divert water to nonriparian lands, the riparian owner is entitled to restrain any diversion which will deprive him of the customary flow of water which is or may be beneficial to his land. He is not limited by any measure of reasonableness." (*Miller & Lux v. Madera Canal etc. Co.* (1909) 155 Cal. 59, 64, 99 P. 502, 511.)

A legislative attempt to curtail riparian rights was struck down in *Herminghaus v. South. California Edison Co., supra,* 200 Cal. 81, 252 P. 607.[7] (See *Gin S. Chow v. City of Santa Barbara,* supra, 217 Cal. 673 at p. 698, 22 P.2d 5.) Immediately following the

[7]The statute referred to in *Herminghaus* was the so-called Water Commission Act of 1913 (Stats.1913, p. 1012). Under sections 11 and 42 of that Act appellants asserted the right to reservoir and store practically unlimited amounts of San Joaquin River water. The court held that the exercise of police powers by the legislative department of this state would arbitrarily and unreasonably destroy the vested rights of the riparian owners in private property. (*Herminghaus v. South. California Edison Co., supra,* 200 Cal. 81 at pp. 117-119, 252 P. 607.) The court did add, however, "If the state were here assaying to uphold an effort on its part *to work out impartially, unselfishly and in the interests of the whole people some general plan or system for the equitable adjustment of rights and uses in its flowing streams* with a view to the conservation, development, and distribution of the dynamic forces and generative and fertilizing fructibilities of their waters, it might well be argued that public policy, public interest, and a most liberal interpretation of the police powers of the state might rightfully be invoked in support of such an effort." (Id. at p. 120, 252 P. at p. 623, emphasis added.)

Herminghaus decision the Legislature in 1927 proposed an amendment to the Constitution by adding section 3 of article XIV. This amendment was adopted by the electors of the state in 1928. (*Gin S. Chow v. City of Santa Barbara,* supra, 217 Cal. at p. 699, 22 P.2d 5.) "The purpose of the amendment was stated to be 'to prevent the waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea', and is an effort 'on the part of the state, in the interest of the people of the state, to conserve our waters' without interference with the beneficial uses to which such waters may be put by the owners of water rights, including riparian owners." (*Gin S. Chow v. City of Santa Barbara, supra* at p. 700, 22 P.2d at p. 16.)[8]

A more recent comment on the history of this constitutional provision appears in *Joslin v. Marin Mun. Water Dist., supra,* 67 Cal.2d 132, 60 Cal.Rptr. 377, 429 P.2d 889, where that decision states: "The amendment was generally construed as applying a rule of reasonable use *'to all water rights enjoyed or asserted in this state,* whether the same be grounded on the riparian right or the right, analogous to the riparian right, of the overlying land owner, or the percolating water right, or the appropriative right.'

[8]*Gin S. Chow* sustained a finding that waters to be taken and impounded from the Santa Ynez River by defendants were extraordinary storm waters, not a part of the usual and customary flow of the stream, and that plaintiffs would therefore not be deprived of any beneficial use of water to which they were entitled.

[Citation.]" (Id. at pp. 137-138, 60 Cal.Rptr. at p. 381, 429 P.2d at p. 893, emphasis added.)

Joslin went on to state that the effect of the amendment was epitomized as follows in *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367, 40 P.2d 486, 491: "1. The right to the use of water is limited to such water as shall be reasonably required for the beneficial use to be served. 2. Such right does not extend to the waste of water. 3. Such right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion of water. 4. Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution."[9]

Immediately following the language quoted above, the *Peabody* court had this to say: "The foregoing mandates are plain, they are positive, and admit of no exception. *They apply to the use of all water, under whatever right the use may be enjoyed.* The problem is to apply these rules in the varying circumstances of cases as they arise. [¶] The waters of our streams are not like land which is static, can be measured and divided and the division remain the same. Water is constantly shifting, and the supply changes to some extent every day. A stream supply may be divided but the product of the division in no wise remains the same. *When the supply is limited public interest requires that there be the greatest*

[9]In *Peabody,* several lower riparian owners sought to enjoin the City of Vallejo from, as an appropriator, damming the waters of a creek and diverting them to be used for municipal purposes. Plaintiffs asserted a right to have all of the waters flow without interruption.

number of beneficial uses which the supply can yield." (*Peabody v. City of Vallejo,* supra, 2 Cal.2d 351 at pp. 367-368, 40 P.2d 486 at p. 491, emphasis added.)

This language is clear and can hardly be misunderstood. The court in *Peabody* reversed a judgment of the trial court granting plaintiffs an absolute injunction, however, holding that other forms of relief were available and would be adequate, and directing the trial court on remand to determine the rights of the parties "in harmony with the new constitutional policy of conservation of waters. . . ." (*Peabody v. City of Vallejo,* supra, 2 Cal.2d 351 at p. 383, 40 P.2d at p. 499.)

The Supreme Court reiterated the proposition that article XIV applies to all users of water four years later in *Meridian, Ltd. v. San Francisco* (1939) 13 Cal.2d 424, 447, 90 P.2d 537.

It seems that the real lesson to be gleaned from our water law history, therefore, is that the courts have generally been acutely aware of the necessity for flexibility in construing the law to keep pace with the needs and transformations constantly taking place in our rapidly changing society.

The alert trial judge undoubtedly had this in mind when he mentioned in his opinion that he had "no great difficulty in saying that what is 'reasonable' under Article XIV, Section 3, is not fixed and that today a determination of reasonableness should properly include, when appropriate under the facts, environmental factors such as the recreational, fish and wildlife uses of a river. Court decisions applying

Article XIV, Section 3, *do not preclude such a view* and this appears to be the interpretation of the State Water Resources Control Board, an interpretation entitled to considerable respect. See Decisions 1379 and 1400." (Emphasis added.)

But, he reasoned, since no cases have so far reached the appellate level to which article XIV, section 3, has been deemed to be applicable which did not involve competing claims to property rights in water, it would be presumptuous for a trial judge to broadly construe it to apply to other water disputes of a kind not heretofore sanctioned by case law.

He went on to say, however: "It can, of course, he argued that the question has not been squarely presented to the appellate courts, that past litigation has involved competing water rights claims and that, therefore, the courts have not had to decide whether the constitutional provision has any scope of operation beyond the resolution of such claims. [¶] *This argument may be available to an appellate court.* However, as I have tried to indicate, the provision throughout its history has been viewed as dealing with asserted water rights and, specifically, as extending the rule of reasonableness to contests between riparian owners and appropriators. I have no basis for now turning the provision into something very different." (Emphasis added.)

The question as to whether or not article XIV, section 3, may be properly interpreted to encompass claims based upon environmental factors such as those involved here is therefore one of first instance

that it is now the responsibility of this court to determine.

We begin by taking a closer look at the language of article XIV, section 3, having in mind the fundamental rule of interpretation that "constitutions, like laws, must be construed that full force and effect shall be given to every portion thereof. The legal intendment is that each and every sentence and clause has been inserted for some useful purpose, and when rightly understood has some practical operation." (*People v. Zolotoff* (1941) 48 Cal.App.2d 360, 364, 119 P.2d 745, 747.)

Thus viewed, it would appear from the text of the amendment itself that it was not intended to be interpreted restrictively. Otherwise, as pointed out by the Attorney General in his amicus curiae brief, the first two sentences focusing on the "use" of water would appear to be superfluous—a construction we are admonished to avoid.[10] Furthermore, these are the two sentences that are incorporated alone in the Water

[10]Article XIV, section 3, has been heretofore set forth in its entirety at pages 3 and 4. As a matter of convenience, however, we again set forth the first two sentences. "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water."

Code as section 100, indicating that they are to be treated and considered separate and apart from the remainder. Riparian rights are mentioned only when we come to the third sentence, the language of which is isolated from the rest of the text to become section 101 of the Water Code. This dichotomy appears to be clear also from the very title given to the amendment: "Conservation of water resources; restriction of riparian rights." We must therefore construe this division as indicating that the first two sentences are to be applied without qualification to every right to the use of the diminishing water resources of this state.

Control of the use of *all* waters of the state for the benefit of the public at large is also spelled out in other provisions of the Water Code itself. For example, under the same heading, "General State Policy", section 104 provides, "It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection." A similar expression is found in section 105, which states: "It is hereby declared that the protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State and that the State shall determine in what way the water of the State, both surface and underground, should be developed for the *greatest public benefit.*" (Emphasis added.)

Moreover, the Legislature definitely recognized that the amendment was intended to encompass a broad goal of conservation when it adopted the California Wild and Scenic Rivers Act. (See Pub.Resources Code, § 5093.50 et seq.[11] in which it declared it to be the policy of this state to permit certain waters to remain in their free flowing primitive state.) Section 5093.50 of the Public Resources Code thus states in part: "It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery or wildlife values, shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water *within the meaning of Section 3 of Article XIV of the State Constitution.*" (Emphasis added.)

The Legislature has thus interpreted article XIV, section 3, of the Constitution as extending the rule of reasonableness of use to include a beneficial public use not heretofore specifically mentioned in the decisions. Furthermore, the provisions of the California Wild and Scenic Rivers Act obviously have nothing to do with claims to property rights in waters.[12]

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[11]A section of the American River and the lower American River were designated as components of the system. (See Pub. Resources Code, § 5093.54, subd. e.)

[12]Earlier, the Legislature dramatically manifested its anxiety over the threat of environmental blight by the passage of the Environmental Quality Act of 1970 (see Pub.Resources Code, § 21000 et seq.) which, much like the National Environmental

It is well settled that "When a constitutional provision is susceptible of more than one reasonable interpretation, an interpretation placed upon it by the Legislature is of persuasive significance." (*Miro v. Superior Court* (1970) 5 Cal.App.3d 87, 99, 84 Cal.Rptr. 874, 881; *Lundberg v. County of Alameda* (1956) 46 Cal.2d 644, 652, 298 P.2d 1.)

Turning again to case law, we note that *Joslin v. Marin Mun. Water Dist., supra,* 67 Cal.2d 132, 60 Cal.Rptr. 377, 429 P.2d 889, seems to support rather than to preclude a broad interpretation of the amendment. In that connection, the court stated, "Although, as we have said, what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved *in vacuo* isolated from state-wide considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment." (Id. at p. 140, 60 Cal.Rptr. at p. 382, 429 P.2d at p. 894.)

The trial court in mentioning that *Joslin* is the most recent decision of the Supreme Court which

Policy Act of 1969 (42 U.S.C.A., §§ 4321-4347) begins by declaring that "The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern." (Pub.Resources Code, § 21000, subd. a.) This Act requires "governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality." (Pub.Resources Code, § 21001, subd. f.) This is to include "enjoyment of aesthetic, natural, scenic, and historical environmental qualities," (Pub.Resources Code, § 21001, subd. b) and to prevent such consequences as "the elimination of fish or wildlife species due to man's activities, . . ." (Pub.Resources Code, § 21001, subd. c.)

discusses the amendment also added that it "sets forth the view which our Supreme Court has consistently taken." *Joslin,* however, was decided prior to the landmark decision of the United States Supreme Court in *Sierra Club v. Morton* (1971) 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636. Although the court reached the conclusion in *Morton* that the petitioner had no standing to sue since it had asserted no individualized harm to itself or its members, it nevertheless recognized that: "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." (Id. at p. 734, 92 S.Ct. at p. 1366.)

Some time ago, our Supreme Court in *Meridian, Ltd. v. San Francisco, supra,* 13 Cal.2d 424, 90 P.2d 537, also made it clear that the actual range and effect of the amendment could be established only as cases are presented to the courts. There it was clairvoyantly stated, ". . . 'Obviously, it is impossible for this court or any court to cover, in three or four decisions, the entire range of the effect of the amendment upon all water controversies that may arise in this state. The full scope of the new constitutional provision can be determined only after a large number of cases presenting different conditions shall have been decided.'" (Id. at p. 444, 90 P.2d at p. 547.)

It is now a well established principle that whenever possible constitutional provisions should be interpreted liberally and realistically "to meet changing conditions and the growing needs of the people." (*Miro v. Superior Court, supra,* 5 Cal.App. 3d 87 at p. 98, 84 Cal.Rptr. 874 at p. 880; see also *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 635, 268 P.2d 723; *Los Angeles Met. Transit Authority v. Public Util. Com.* (1963) 59 Cal.2d 863, 31 Cal.Rptr. 463, 382 P.2d 583; *Housing Authority v. Peden* (1963) 212 Cal.App.2d 276, 280, 28 Cal.Rptr. 11.)

This salutary rule has perhaps been most aptly explained in the following language quoted by the Supreme Court with approval in *People v. Western Air Lines, supra,* 42 Cal.2d 621 at page 635, 268 P.2d 723 at page 731: " '. . . A constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply in different periods to all things to which they are in their nature applicable. . . .' "

We therefore have no difficulty in holding that article XIV, section 3, can only reasonably be interpreted as an unqualified expression of fundamental policy by the people of California that the general welfare requires that *all* of "the water resources of the State be put to beneficial use to the fullest extent of which they are capable."

IS RECYCLING WASTE WATER A TECHNIQUE THAT MAY BE REQUIRED UNDER THE AMENDMENT UPON A PROPER SHOWING AS A METHOD OF PREVENTING WASTE OR THE UNREASONABLE USE OF WATER?

In light of the foregoing, we consider here separately the merits of the allegations upon which appellants' first cause of action is based. This is predicated on EBMUD's determination not to undertake the development of facilities for recycling or reclaiming the water now in use in its system. It is alleged that this would be a means of augmenting existing resources and cutting down materially on any need for additional water supplies from other sources, including the American River.[13] Hence, they say, this is an unreasonable waste, and a failure to put available water resources to the fullest beneficial use of which they are capable, contrary to the require-

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[13]The government contract provides for such a situation in article 3, subdivision b, which states "(b) If at any time or times during the term of this contract the District determines that its water needs for the remainder of said term are for quantities different from those set forth in subdivision (a) of this article by agreement the parties may decrease or, to the extent that water is available, as determined by the Contracting Officer, increase the quantities of water to be delivered by the United States."

Also, the primary purpose for which the Auburn-Folsom South Unit was constructed as part of the Central Valley Project was to increase the supply of water available for irrigation and other beneficial uses in the central valleys. (43 U.S.C.A., § 616aaa.) Therefore, it cannot be said that any interference with EBMUD's purchase of water from the United States would impinge upon any federal interests since obviously more water would then be available for irrigation and use in the central valleys.

ments of the amendment and its statutory counterpart, Water Code section 100.

Plaintiffs' first cause of action is therefore an independent cause of action, not based on the American River contracts, and the question as to federal preemption elsewhere involved is not present here.

The demurrer to this count was sustained after the trial judge, prompted by what he acknowledged to be judicial restraint, had ruled that the constitutional ambit should be limited by historical precedent to the resolution of competing claims to property rights in water.

In testing the sufficiency of the allegations to support a cause of action we must, of course, treat the demurrer as admitting all material facts properly pleaded, but not mere contentions, deductions, or conclusions of law or fact. (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713, 63 Cal.Rptr. 724, 433 P.2d 732.) Public records and other matters that may be judicially noticed will also be considered. (*Id.* at p. 716; Evid.Code, § 459.)

We observe at the outset that appellants are not contending that the failure of EBMUD to adopt a program for recycling its water is ipso facto a violation of article XIV, section 3. What they do say is simply that they have set forth sufficient facts in their pleading to entitle them to proceed to trial so that the trial court can determine in the first instance whether or not its present water resources are indeed being "put to beneficial use to the fullest extent of which they are capable."

Patently, article XIV, section 3 mandates that "the *waste or unreasonable use or unreasonable method of use of water* be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." (Emphasis added.) And the Supreme Court made it abundantly clear in *Meridian, Ltd. v. San Francisco, supra,* 13 Cal.2d 424, 90 P.2d 537, that the constitutional restriction against committing waste is one that is imposed on all water users, including those who may have none of the traditional property rights in water. "The duty not to commit waste is enjoined on all users of water. An accepted definition of the term 'waste', as applied to the use of water, may be said to be: 'to use needlessly or without valuable result; to employ prodigally or without any considerable return or effect, and to use without serving a purpose.' (Webster's New International Dict., 2d ed.) The term is necessarily relative." (Id. at p. 447, 90 P.2d at p. 548.)

The recycling or reclamation of water as a conservation measure is, of course, a relatively new concept. Its technological progress in recent years, however, has been of such significance that the Declaration of Policy in California's Water Reclamation Law (Wat.Code, § 13500 et seq.) now includes the following Legislative finding: "§ 13511. The Legislature finds and declares that a substantial portion of the future water requirements of this state may be economically met by beneficial use of reclaimed

water. [¶] The Legislature further finds and declares that the utilization of reclaimed water by local communities for domestic, agricultural, industrial, recreational, and fish and wildlife purposes will contribute to the peace, health, safety and welfare of the people of the state. Use of reclaimed water constitutes the development of 'new basic water supplies' as that term is used in Chapter 5 (commencing with Section 12880) of Part 6 of Division 6."[14]

More than forty years ago the Supreme Court, with considerable foresight, had this to say about the changing standards for determining whether water is being put to a beneficial use under article XIV, section 3: "What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great

[14]For an excellent current discussion of the growing need for water reclamation for both conservation purposes and environmental protection, see the forward to Bulletin No. 189, Waste Water Reclamation, State of the Art, March 1973, by William R. Gianello, then Director of the California Department of Water Resources, from which we have excerpted the following: "The conservation of California's water, and the closely related task of environmental preservation, require efficient use of our water resources. Through prevention of wasteful practices during the initial use of water, and careful treatment of waste water as it is used and returned to rivers and streams, we can partially achieve this goal. However, an even more pronounced step towards true environmental protection and water conservation will result from increased reclamation of waste water—the treatment and reuse of our municipal, industrial, and agricultural water supplies. [¶] Increased reclamation of waste water can mean fewer pollutants discharged to receiving waters. Re-use of once-used water will augment needed supplemental supplies and reduce the necessity for further importation of water in some parts of California." (P. 16.) This bulletin also mentions that among the urgent reasons for reclaiming waste water are to "Augment natural water supplies, thus reducing the need for development of new sources and imports of water, and permitting rivers to remain in their natural state."

scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time." (*Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 567, 45 P.2d 972, 1007.)

Appellants seek only to be permitted to proceed to trial in order that the trial court may determine from the evidence to be presented by both parties whether respondent, in refusing to reclaim its waste water, is making a reasonable or unreasonable use of its existing water resources in the face of today's changing conditions. "Likewise, what is a reasonable or unreasonable use of water is a judicial question to be determined in the first instance by the trial court. There would seem to be no more difficulty in ascertaining what is a reasonable use of water than there is in determining probable cause, reasonable doubt, reasonable diligence, preponderance of evidence, a rate that is just and reasonable, public convenience and necessity, and numerous other problems which in their nature are not subject to precise definition but which tribunals exercising judicial functions must determine." (*Gin S. Chow v. City of Santa Barbara, supra,* 217 Cal. 673 at p. 706, 22 P.2d 5 at p. 18; see also *Joslin v. Marin Mun. Water Dist.,* supra, 67 Cal.2d 132 at p. 139.)

Or, as more succinctly put recently in the *Joslin* case, "What is a reasonable use or method of use of water is a question of fact to be determined according to the circumstances in each particular case." (*Joslin v. Marin Mun. Water Dist.,* supra, 67 Cal.2d

132 at p. 139, 60 Cal.Rptr. 377 at p. 382, 429 P.2d 889 at p. 894.)

Which brings us to *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 207 P.2d 17 (cert. den. 339 U.S. 937, 70 S.Ct. 671, 94 L.Ed. 1354), a case which respondents would have us construe as deciding as a matter of law that the failure to reclaim water may not be deemed to be in violation of article XIV, section 3.

Among the numerous contentions that were there considered by the court was one involving the question as to whether Pasadena's failure to recapture certain storm waters was a violation of article XIV, section 3. The point was of such relative unimportance that it could be disposed of with these terse comments: "The failure of the city of Pasadena to capture and return to the underground basin storm waters and waters used to flush streets, fight fires, and flow sewage does not, as claimed by appellant, constitute waste in violation of section 3 of article XIV of the California Constitution. Storm drains used for flood control carried some water outside the area, but this does not mean it was wasted, and *there is no evidence that there was any waste in connection with the use of water in ordinary and necessary municipal activities.*" *(City of Pasadena v. City of Alhambra,* supra, 33 Cal.2d 908 at pp. 934-935, 207 P.2d 17 at p. 33, emphasis added.)

This cannot be read as a determination by the court that reclamation is not encompassed by article XIV, section 3; on the contrary it appears that the

court merely reached the conclusion that it did on the factual record before it, and the absence of evidence to support a contrary conclusion. In any event, in the light of the remarkable changes in technology regarding reclamation since 1949, and the current state policy in favor of encouraging reclamation embodied in the Water Reclamation Law (Wat.Code, § 13500 et seq.), *Pasadena* is not dispositive of this case.

It is our conclusion that appellants have therefore raised a justiciable issue in connection with their first cause of action. It may very well be, however, that at a trial they may not be able to offer sufficient evidence to demonstrate that recycling or reclaiming water has yet become an economically practical or feasible method of preventing waste in connection with respondent EBMUD's operations.

Elsewhere we pointed out that the judgment of dismissal in this case was based upon a general demurrer attacking the complaint as a whole. Since we now hold that there was at least one count in the complaint that was not vulnerable to objection, the demurrer should have been overruled. (*Shook v. Pearson* (1950) 99 Cal.App.2d 348, 221 P.2d 757; also see the authorities heretofore cited.) The judgment of dismissal as to plaintiffs' complaint must therefore be dismissed.

This must not be construed, however, as our approval of appellants' right to relief on any theory other than that set forth in their first alleged cause of action. Our views in that regard will be apparent,

however, from the following discussion of the trial court's ruling in connection with the trial court's order sustaining a demurrer to Sacramento's complaint in intervention.

DID THE TRIAL COURT RULE PROPERLY THAT EBMUD'S AUTHORITY TO PURCHASE FEDERAL PROJECT WATER MUST BE DETERMINED UNDER FEDERAL LAW?

The single cause of action asserted by intervenor and appellant County of Sacramento (as were the remaining causes of action in appellant's complaint) is based on EBMUD's future plans to divert water from the American River under contracts with the U.S. Bureau of Reclamation. Respondents' contention that Sacramento County lacked standing to intervene in this case was properly rejected by the trial court. Also, the Attorney General was merely performing his duty as chief law officer of the state in filing an *amicus curiae* brief in support of the intervenor. (Cal.Const., art. V, § 13; Gov.Code, § 12600.)

The complaint in intervention alleges that taking water from the Folsom South Canal above Clay will destroy opportunities for multiple use of the waters in the lower American, and is therefore an unreasonable diversion that could be easily avoided by taking the water from a downstream location.

The trial judge reached the conclusion however that state law does not apply to the situation at all. "The factual setting for this question is that EBMUD has contracted with the U.S. Bureau of

Reclamation to buy water in the future from a water project that the Bureau is in the process of constructing. The project has been authorized by Congress; the Bureau has obtained a permit for it from the State Water Resources Control Board; the legality of the project itself is not under attack here."

He therefore "somewhat reluctantly" agreed with the respondents that "under a line of U.S. Supreme Court decisions that include *Ivanhoe Irrigation District v. McCracken* (1958) 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313; *Dugan v. Rank* (1963) 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 and *City of Fresno v. California* (1963) 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28 the water that EBMUD will be buying is federal water and not subject to state law." He felt constrained to add that he found the arguments against federal supremacy "interesting and unpersuasive."

We are therefore confronted initially with a jurisdictional question which would bar this court from considering any other issues in this case if it is answered adversely to appellants.

From our own independent analysis, we necessarily conclude that the trial judge's ruling on this issue was correct. This is because, while the argument that the complaint in intervention stated a valid cause of action under state law may have been persuasive, we agree that federal law must govern here. The fact that we have likewise reached this conclusion with some reluctance may be of little solace to appellants, however.

The principal authorities that seem to compel this decision are a series of appellate decisions involving the validity of certain contracts entered into between two state irrigation districts and a water district on the one hand, and the United States on the other, known collectively as the *Ivanhoe* cases.

In the first of this line of cases, the California Supreme Court in *Ivanhoe Irr. Dist. v. All Parties* (1957) 47 Cal.2d 597, 306 P.2d 824 (hereinafter "*Ivanhoe I*"), upheld the validity of the contracts there in question. Its opinion turned on an interpretation of section 8 of the Reclamation Act of 1902[15] which provides that the Act is not to be construed as interfering with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation, . . ." The contracts incorporated the requirements of section 5 of the Reclamation Act[16] and

[15]"Section 8: 'That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.' 32 Stat. 390, 43 U.S.C. §§ 372, 383." (*Ivanhoe Irrig. Dist. v. McCracken* (1958) 357 U.S. 275, 278-279, 78 S.Ct. 1174, 1177, fn. 4.)

[16]"Section 5: '. . . No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.' 32 Stat. 389, 43 U.S.C. § 431. This provision was substantially re-enacted in § 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649, as amended, 70 Stat. 524, 43 U.S.C. § 423e." (*Ivanhoe Irrig. Dist. v. McCracken* (1958) 357 U.S. 275, 277-278, 78 S.Ct. 1174, 1177, fn. 2.)

provided that the project water shall not be furnished to lands in excess of 160 acres in single ownership. In effect, *Ivanhoe I* held that section 8 overrides all other sections of the Reclamation Act. Applying a "trust theory" under state law, it purported to hold that the Federal Government could acquire no title to appropriative water rights free of a trust in the State of California for the benefit of its people. (Id. at p. 620, 306 P.2d 824.) From this premise, it reached the conclusion that the excess lands provision was inoperative under state law.

Ivanhoe I, however, was reversed by the Supreme Court of the United States in *Ivanhoe Irrig. Dist. v. McCracken* (1958) 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313. In rejecting the California court's interpretation, it specifically held that "We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State. To read § 8 to the contrary would require the Secretary to violate § 5, the provisions of which, as we shall see, have been national policy for over half a century. Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5." (*Ivanhoe Irrig. Dist. v. Mc-*

Cracken, supra, 357 U.S. 275 at p. 292, 78 S.Ct. 1174 at p. 1184.)

Following this reversal, the California Supreme Court recalled its remittiturs and permitted rebriefing. In the decision which followed, *Ivanhoe Irr. Dist. v. All Parties* (1960) 53 Cal.2d 692, 3 Cal.Rptr. 317, 350 P.2d 69 (hereinafter *"Ivanhoe II"*), the court repudiated the "trust theory", referring to it as "sheer dicta" (id. at p. 716, 3 Cal.Rptr. 317, 350 P.2d 69) and stated that under the decision of the United States Supreme Court "the holding of this court on the prior appeals that the 160-acre limitation was in violation of the 'trust' duties imposed upon the public owners of water rights by state law, was erroneous." (Id. at p. 709, 3 Cal.Rptr. at p. 327, 350 P.2d at p. 79.)

Elsewhere, it acknowledged that its former construction giving primacy to section 8 of the Reclamation Act was also erroneous. In this connection, it quoted the following key language from the United States Supreme Court's opinion: "'As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operations of federal projects.'" (*Ivanhoe Irr. Dist. v. All Parties, supra,* 53 Cal.2d 692 at p. 708, 3 Cal.Rptr. at p. 326, 350 P.2d at p. 78.)

Addressing itself to the question of whether the districts have the legal capacity to contract to buy

the water under state law, *Ivanhoe II* pointed out that state statutes specifically authorize the districts to enter into such contracts. (*Ivanhoe Irr. Dist. v. All Parties, supra,* 53 Cal.2d 692 at pp. 704-716, 3 Cal.Rptr. 317, 350 P.2d 69.)

In deciding that the doctrine of federal supremacy[17] applies, and that state courts are without authority to interfere with contracts of this kind, *Ivanhoe II* had this to say: "The federal government with federal funds has lawfully developed water—project water—that without the project would not have been developed. The United States and the State of California have provided by appropriate legislation for entering into contracts regarding this water, . . . This water belongs to or by appropriate action may be secured by the United States. In a very real sense it is or will become the property of the United States." (*Ivanhoe Irr. Dist. v. All Parties, supra,* 53 Cal.2d 692 at p. 704, 3 Cal.Rptr. 317 at p. 323, 350 P.2d 69 at p. 75.) In other words, "It is or may become federal water." (Id. at p. 716, 3 Cal.Rptr. 317 at p. 331, 350 P.2d 69 at p. 83.)

"Obviously, the federal government lawfully may contract to sell water that it does not own, as long

[17]The object of the supremacy clause, as applied to federal contracts, was well put in *U.S. v. Allegheny County* (1943) 322 U.S. 174, 183, 64 S.Ct. 908, 913, 88 L.Ed. 1209: "The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State."

as it has the legal power to secure title. The United States Supreme Court has declared as a matter of federal law that the United States possesses such power. That holding is binding upon this court." (*Ivanhoe Irr. Dist. v. All Parties, supra,* 53 Cal.2d 692 at p. 715, 3 Cal.Rptr. 317 at p. 331, 350 P.2d 69 at p. 83.)

Nor is there merit in appellants' contention that the authority of EBMUD as a state-created agency to contract with the United States for water is, in the first instance, questionable under state law. The capacity of irrigation districts to enter into contracts with the United States was, as already mentioned, an issue that was raised and considered in *Ivanhoe II, supra,* 53 Cal.2d 692 at page 706, 3 Cal.Rptr. 317, 350 P.2d 69 et seq., and it appears that the questions are analogous.

Respondent EBMUD is formed and functioning under the Municipal Utility District Act (Pub.Util. Code, div. 6, § 11501 et seq.). Under this Act EBMUD has the power, among other things, to "acquire, construct, own, operate, control, or use, within or without, or partly within or partly without, the district, works or parts of works for supplying the inhabitants of the district and public agencies therein . . . with . . . water, . . ." (Pub.Util.Code, § 12801.) It may "make contracts and enter into stipulations of any nature whatsoever . . . and . . . do all acts necessary and convenient for the full exercise of the powers granted. . . ." (Pub.Util.Code, § 12721.) Furthermore, a district "may enter into contracts and

cooperate with, and accept cooperation from, the United States, or any department, instrumentality, or agency thereof, in the construction, maintenance, and operation, of any such enterprise in accordance with any legislation which Congress may have heretofore adopted or may hereafter adopt . . . [and] may do any and all things necessary in order to avail itself of such aid, assistance, and cooperation under any federal legislation now or hereafter enacted." (Pub.Util.Code, § 12844.)

In *Ivanhoe II*, the court noted that Water Code section 23195 authorized irrigation districts to enter into contracts with the United States. (*Ivanhoe Irr. Dist. v. All Parties, supra,* 53 Cal.2d 692 at p. 706, 3 Cal.Rptr. 317, 350 P.2d 69.) It also noted that sections 23197 and 23200 of the Water Code are exceptions to Water Code section 22250 which section provides that discrimination among water users in an irrigation district is contrary to state law. (Id. at p. 709, 3 Cal.Rptr. 317, 350 P.2d 69.) In particular, section 23200 reads: " 'All water, the right to the use of which is acquired by a district under any contract with the United States shall be distributed and apportioned by the district in accordance with the applicable acts of Congress, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of the contract, . . .' " (Id. at p. 710, 3 Cal.Rptr. at p. 327, 350 P.2d at p. 79.)

Although the applicable provisions in the Public Utilities Code are not as specific as those in the Water Code, it appears that the principle is the same and,

therefore, that it cannot be said that EBMUD lacked the authority to enter into a contract with the United States.

Since the complaint in intervention therefore fails to state a cause of action cognizable in this court, the trial judge's order sustaining the demurrer to that pleading without leave to amend was correct. The order dismissing the complaint is reversed and the order dismissing the complaint in intervention is affirmed. Plaintiffs are to recover their costs on appeal from respondents. Respondents are to recover their costs on appeal from the intervenor-appellant to the extent their costs relate to the appeal of the intervenor.

MOLINARI, P. J., and SIMS, J., concur.

Appendix C

(5 ERC 1295)

In the Superior Court of the State of California
in and for the County of Alameda

No. 425,955

Environmental Defense Fund, Inc.: Oceanic Society; Save the American River Association; Peter Zars; Lucretia Edwards; Jean Siri; and Gerald Meral,

Plaintiffs,

vs.

East Bay Municipal Utility District; DeWitt Kreuger; Robert T. Nahas; A. C. Carrington; G. Howard Robinson; Charles J. Wright; John S. Harnett; and Does I through XX,

Defendants,

County of Sacramento, a Political Subdivision of the State of California,

Intervenor.

DECISION AND ORDER ON DEMURRERS TO FIRST AMENDED COMPLAINT AND TO COMPLAINT IN INTERVENTION

This action involves water that the East Bay Municipal Utilities District plans to buy in the mid-nineteen eighties. In that sense, it is a lawsuit about future. But the future is being shaped now: The district has contracted to buy the water from a federal project which is under construction.

The factual and legal issues are complex, but the underlying question can be stated simply: Can the district lawfully contract to buy the water? This and other questions arise in the setting of general demurrers to the first amended complaint and to the complaint in intervention. A demurrer to the original complaint was previously sustained with leave to amend. The complaint in intervention is being considered here for the first time. Even in this early phase of the case, the papers before the court total hundreds of pages.

I will first summarize the pleadings (Section I). Next, I will deal with the absence of an allegedly essential party (Section II A), the propriety of intervention (Section II B) and intervenor's standing to sue (Section II C). I will then discuss whether state law applies to the case (Section III). In the final section, I will assume that it does and consider whether the alleged facts make out any violation.

By way of preview, I find that plaintiffs and intervenor can hurdle the procedural obstacles. I also conclude that the California constitutional and statutory provisions on which they rely do not apply; federal law controls here. Finally, even if federal law were not controlling, no violation of state law by defendants has been established.

This decision will succumb to an ailment common to water cases: length. I will try to sketch rather than exhaustively state my views. I will also strive to avoid another characteristic often found in water law decisions and that is their near incomprehensibility.

I

We begin with the parties and their factual allegations.

A. *The Complaint*

1. *The plaintiffs.* Plaintiffs are three organizations and four individuals. Plaintiff *Environmental Defense Fund* is a nationwide nonprofit membership corporation, with many members in Alameda and Contra Costa Counties. It is a New York corporation with an office in Berkeley, California. Among its purposes is the protection of the natural environment, including rivers. It has brought numerous suits throughout the country and is suing here on its behalf as well as on behalf of its members.

Plaintiff *Oceanic Society* is a California nonprofit corporation. It has a particular interest in the preservation of San Francisco Bay's aquatic environment by means of waste water recycling. Plaintiff *Save the American River Association* is a California nonprofit membership corporation, formed to protect the lands adjacent to the lower American River and the quantity and quality of its flow.

The individual plaintiffs are all taxpayers and either homeowners or renters in Alameda or Contra Costa Counties, within the service area of defendant East Bay Municipal Utilities District (hereinafter EBMUD). Three are members of plaintiff Environmental Defense Fund; all have an interest in the preservation of San Franicsco Bay and are concerned with the pollution of the Bay; three have made recrea-

tional use of the American River, one especially has kayaked extensively on parts of the river that would be inundated under present plans.

2. *The defendants.* EBMUD is a utility district supplying water to large portions of Alameda and Contra Costa Counties. It also engages, through its Special District One, in some treatment of waste water. Defendant Harnett is EBMUD's general manager.

3. *Factual allegations.* Plaintiffs set forth the facts upon which they rely with unusual lucidity. In summarizing them, I will, for the sake of simplicity, avoid repeated use of the word "alleged." Plaintiffs charge:

EBMUD supplies water to over a million people in Alameda and Contra Costa Counties, at an average rate of 212 million gallons a day. EBMUD gets most of the water from the Mokelumne River to which it holds rights to 325 million gallons a day. EBMUD organized and controls Special District Number One which operates a sewage treatment plant. This plant gives waste water only "primary treatment" and discharges the effluent into San Francisco Bay.

EBMUD has decided that by 1985 water from the Mokelumne will no longer be sufficient to meet the anticipated water needs of the people in the district. It began a wide-ranging search for additional water. As part of the search, it signed an agreement in 1968 with the U. S. Bureau of Reclamation and other parties. This agreement looked toward getting water from the American River and in it EBMUD agreed

to certain conditions if it should later contract with the Bureau for water from the Bureau's American River Division of the Central Valley Project. One condition makes EBMUD responsible for a construction of a canal, known as the Hood-Clay Connection, if federal and state authorities do not build it and if the Bureau finds it to be necessary. The canal is an integral part of the proposed East Side Division of the Central Valley Project. The agreement commits EBMUD to actively support congressional authorization and federal construction of the East Side Division, including the Hood-Clay Connection.

This initial agreement was followed by a contract signed in 1970 between EBMUD and the Bureau. EBMUD agreed to buy certain increasing quantities of water as soon as it becomes available upon completion of the Auburn-Folson-South Project on the American River. The water will be diverted from the Folsom-South Canal at a point above the intersection of the canal and the proposed Hood-Clay Connection and thus will not be available to flow down the lower American River.

In contracting for American River water, EBMUD did not recognize its legal obligation to embark on a waste-water reclamation program. EBMUD has decided not to develop reclamation facilities to assist in meeting its present or future water needs. This decision as well as the seeking of additional water from the American River are abuses of discretion. The American River water will cost consumers more than reclaimed water. In addition, EBMUD has made "a

major contribution . . . to the likelihood that the Bureau will (a) complete its construction of the Auburn-Folson-South Project and (b) undertake construction of the East Side Division." These two endeavors will have serious harmful environmental consequences specified in the complaint, among them the destruction of the free-flowing north and middle forks of the American and the reduction of flow on the lower American, with the attendent loss of boating, fishing and other recreational opportunities. EBMUD will also continue to pollute the Bay with resulting environmental damage.

4. *Causes of Action.* These allegations give rise to three asserted causes of action. The first is that EBMUD's decision not to develop water reclamation facilities violates Article XIV, Section 3 of the California Constitution, Water Code Section 100 and Water Code Sections 13500 et seq. The second is that EBMUD's decision to seek water from the American River violates the same provisions. The third is that the two decisions in combination contravene these provisions.

5. *Relief sought.* Plaintiffs seek a declaration that the two decisions are illegal, an order requiring EBMUD to use its best efforts to rescind the 1970 contract, an order forbidding EBMUD from issuing bonds or raising funds to construct facilities for transmission and distribution of water from the American River, and an order requiring defendants "to undertake such a reclamation program as the proof will determine is required by law."

6. *Previous ruling.* This court previously sustained a general demurrer to the complaint with leave to amend.

B. *The Complaint in Intervention*

Intervenor is the County of Sacramento. The county alleges:

The American River is the second largest tributary of the Sacramento. The lower American, running 23 miles from Nimbus Dam to the Sacramento, lies wholly within Sacramento County. The lower American has long been used by the public for a variety of scenic and recreational purposes, including boating, fishing and swimming.

Beginning in 1962, the county developed the American River Parkway Plan. Pursuant to it, the county acquired 2000 acres of land on both sides of the lower American in order to develop a greenbelt for recreational and scenic purposes along the river. The areas covered by the plan will become a regional park; they will be improved in ways specified by the complaint and will cover the equivalent of twelve square miles. The county has already expended over six million dollars for land acquisition and improvements under the plan and expects to spend a million to 1½ million dollars a year in the future.

After outlining EBMUD's agreements with the United States pertaining to the Auburn-Folsom-South Project, the county avers that this project will involve the construction of a dam at Auburn above Folsom Dam and the construction of a canal, the Folsom

South Canal, above Nimbus Dam. The Auburn Dam and Folsom South Canal are presently under construction and, when completed, will divert water from the lower American. EBMUD's part of this diversion will be up to 150,000 acre feet per year or about 133 million gallons a day.

The county then states on information and belief that EBMUD could have contracted with the United States to get sufficient water at least as efficiently and economically from the Sacramento River at or below its confluence with the lower American.

The county next pleads a 1972 decision of the California Water Resources Control Board (Decision 1400). This decision made certain specified findings as to optimum and minimum water flows needed in the lower American for the protection of fish and wildlife and for recreational purposes. The decision orders certain minimum flows below those necessary to provide optimum conditions for fish and wildlife maintenance and recreational purposes and provided for the reduction of such flows below those ordered whenever water supplies are inadequate to meet irrigation needs. The county avers that as more and more water is provided for irrigation and other purposes by the Auburn-Folsom-South Project, the lower American will not have sufficient water to maintain fish and wildlife and to use the river for recreation.

The county's complaint also quotes from the Water Board decision, as follows:

> "The Bureau contract with East Bay Municipal Utility District provides for delivery of water through the Folsom South Canal rather than from a downstream location. This type of water development, while satisfying one water requirement, eliminates the possibility for multiple beneficial uses of the water, and is not sound management of the water resource. If the Bureau contract with the District had required that the District take delivery of project water from the Sacramento River or some other downstream location rather than the Folsom South Canal, an additional 150,000 acre feet of project water supply (equivalent to about 210 cfs of continuous supply) would have been available for stream flow augmentation below Nimbus for fish and recreational purposes prior to ultimate use for municipal purposes. To this extent, the decrease in diversion via Folsom South Canal resulting from increased minimum flows below Nimbus Dam would be eliminated if EBMUD's point of delivery were made from the Sacramento River."

Claiming irreparable injury, the county seeks a declaration that EBMUD "lacked legal capacity to enter into" the 1970 contract and an injunction restraining the defendant from furthering its execution and either ordering it to seek rescission through court action or declaring the contract void.

A general demurrer to the complaint in intervention is one of the matters before the court for decision.

C. *The first amended complaint*

The first amended complaint, also before us at this time, repeats by reference all of the charging allegations of the original complaint and also incorporates

the allegations of the complaint in intervention pertaining to the lower American, its recreational use, the American River Parkway Plan, the availability of Sacramento River water to meet EBMUD needs and the decision of the California Water Resources Control Board. The amended complaint seeks the same relief on the same legal theories as the original complaint.

D. *The demurrers*

The demurrers both to the first amended complaint and the complaint in intervention are general, averring that the complaints fail to state facts sufficient to constitute a cause of action. The legal theories underlying the demurrers will be discussed at appropriate places below.

II

At the outset, this case presents several procedural issues. I will discuss the most important of these.

A. *Joinder*

The United States, which is building the project that will allegedly harm the river, is not before the court. Its absence seems especially striking in view of the contentions that EBMUD's contract with the United States is illegal and that EBMUD should be required to seek rescission.

The absence of the United States as a party might raise serious questions under the new CCP Section 389. (The action was tried after the effective date of the new section.) But defendants have not properly

raised these questions. They have filed general demurrers. They discuss the issue briefly in their attack on the complaint in intervention. They have neither demurred specially as provided by CCP Sec. 430.10 (d), nor have they moved to compel joinder or to dismiss for failing to join an indispensable party.

Under the old Section 389, there was authority to the effect that the court can act on its own motion in this area. Witkin, *California Procedure* (2nd ed.) 1833 and cases there cited. Two reasons lead me to conclude, however, that if this question is to be decided, it should be raised more formally and thoroughly.

First: The power to act on the court's own motion under the old Section 389 stemmed from the view "that failure to join an essential party is essential to jurisdiction of the subject matter . . ." Witkin, *supra*. The jurisdictional nature of joinder has largely disappeared under the new section. See Law Revision Commission comment to the section and compare Rule 82 of the Federal Rules of Civil Procedure.

Second: Section 389 is modeled closely on Rule 19 of the Federal Rules. That rule is normally invoked by appropriate motion. See Rule 12(b) of the Federal Rules.

B. *Propriety of intervention*

Defendants assert that intervenor has not pleaded facts entitling it to intervention. This appears to be a question that may be raised by general demurrer. See *Hausmann v. Farmers Ins. Exchange* (1963), 213 C.A. 2d 611.

CCP Section 387 permits intervention by any person "who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both . . ." The many cases permitting or denying intervention are of limited assistance here. What is of assistance is an understanding of the purposes of intervention and of the balancing process that a decision as to the propriety of intervention involves. This understanding was expressed concisely in *County of San Bernardino v. Harsh California Corp.* (1959), 52 C.2d 341, 346 (per Justice Traynor):

> "The purposes of intervention are to protect the interests of those who may be affected by the judgment (citations) and to obviate delay and multiplicity of actions (citations), but intervention may be denied if these objectives are outweighed by the rights of the original parties to conduct their lawsuit on their own terms. (citations)."

Plaintiffs and intervenor have in common a concern for the environmental protection of the lower American River—a concern that goes to the core of the action. Many of the allegations concerning prospective environmental damage to the river are identical. Plaintiffs and intervenor seem to differ in their ideas on how defendants should meet their future water needs: Plaintiffs show a predilection for waste water reclamation that is not shared by intervenor. They also differ somewhat in the remedies they seek. What they do share are legal theories that EBMUD's decision to seek water from the lower American is unlawful. These theories will occupy us later; the point here is not their soundness but their similarity.

It cannot seriously be doubted that intervenor has a real and practical interest in the matter in litigation and in the success of the parties. The county's interests, to use the language of *County of San Bernardino, supra,* obviously may be affected by a judgment in this case. Defendants seek to underplay the county's interest by a curious argument. Even if plaintiffs win, the argument runs, there may be no benefit to the river. This is because, for all we know, the U. S. Government might then sell the water intended for defendants to others. In legal terms, this amounts to saying that the judgment may or may not affect intervenor's interests, but it does not mean that intervenor has no interest. Certainly a judgment adverse to plaintiffs could, if we accept the factual allegations of the pleadings as we must at this stage, have a substantial adverse effect on the interests of the intervenor.

Turning to the second purpose of intervention, namely, obviating delay and multiplicity of action, it is obviously hard to tell whether denial would cause such delay or multiplicity. We have no way of knowing whether the county would pursue its claim independently. Any such pursuit would mean two complex lawsuits instead of one, with overlapping factual and legal issues.* Little would be gained by that.

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*It may be noted that plaintiffs are more seriously risking multiplicity and delay by their decision not to make the United States a party. Whatever bearing that factor may have on the joinder problem, it patently has none here.

We now balance these considerations against "the rights of the original parties to conduct their lawsuit on their terms." Defendants have not indicated any prejudice from the intervention and none is apparent beyond the disadvantage inherent in any two-on-one situation. Consideration of the pleadings as they now stand does not show any undue broadening of legal or factual issues: It is too early to tell with assurance but it does not look as if intervention forces defendants to fight a two-front war on very different fronts. The differences in the scope of relief sought by plaintiffs and by intervenor are hardly matters that, under these particular circumstances, should cause any great difficulty if and when this litigation gets to that point.

Of course, this kind of balancing involves a certain amount of crystal-ball gazing. That is chancy in any litigation; it is particularly risky in an action such as this whose scope and issues take us into unfamiliar territory. It illustrates why, in much of what I write in this case, I speak without the confident assurance that as judges we are accustomed to bring to our decisions.

C. *Intervenor's standing to sue*

Defendants' contention that the County of Sacramento lacks standing to sue is a little difficult to understand. In essence, defendants urge that the county is not a taxpayer or a resident of EBMUD or a party to the contract and that it may have other remedies by way of seeking review of the action of the State Water Resources Control Board. The latter point

might raise interesting questions in a different context but has no visible relation to the question of standing.

What do we mean by "standing to sue?" Basically, we mean a situation in which "the complaint may state a cause of action in someone, but not in the plaintiff." *Klopstock v. Superior Court* (1941), 17 C.2d 13, 19, cited in Witkin, *California Procedure* (2nd ed.) 2429. Thus, in *Venuto v. Owens-Corning Fiberglass Corp.* (1972), 22 C.A.3d 116, relied on by the defendants, the court dealt with the issue of whether private citizens have a remedy against a public nuisance. It held that a private citizen may sue only if the public nuisance is specially injurious to him.

Venuto does not benefit defendants; neither do the two federal cases cited by it which deal with federal procedure. The inquiry must run along these lines: For the purpose of deciding this issue, we have to assume that there is a cause of action. In other words, that the planned taking of water is illegal, that it will cause the environmental damage to the lower American River which flows through Sacramento County and that it will also damage the facilities the county is developing at considerable expense under its parkway plan. If all that is really so, why is Sacramento County not one of the "persons" in whom the cause of action resides? In whom would the cause of action reside? To argue, as defendants do, that the county could sue other parties in other proceedings does not answer these questions.

Putting this another and perhaps simpler way, to assert lack of standing is to tell a party, in effect, "you are trying to set up a cause of action that belongs to somebody else and you have no authority to do that." But here Sacramento County is patently endeavoring to plead a claim of its own, based on fairly concrete damage to it. Whether Sacramento County, or indeed any of the plaintiffs, actually has a cause of action remains to be seen, of course. But standing does not seem to be a serious problem.

So far, I have commented on several problems of a kind that, no matter how fascinating they may be to our profession, leave citizens shaking their heads in bewilderment and frustration. It may or may not be helpful to say that these problems have to be dealt with because like Mt. Everest—or more accurately, the approaches to the mountain—they are there.

III

We are next faced with the question of whether state law applies to this case at all. The factual setting for this question is that EBMUD has contracted with the U. S. Bureau of Reclamation to buy water in the future from a water project that the Bureau is in the process of constructing. The project has been authorized by Congress; the Bureau has obtained a permit for it from the State Water Resources Control Board; the legality of the project itself is not under attack here.

Defendants contend that from these facts, it follows that the legality of EBMUD's action in contracting

with the Bureau must be determined by federal law and not by the California statutes and constitutional provision on which plaintiffs and intervenor rely.

Somewhat reluctantly, I am inclined to agree. Under a line of U.S. Supreme Court decisions that include *Ivanhoe Irrigation District v. McCracken* (1958), 357 U.S. 275; *Dugan v. Rank* (1963), 372 U.S. 609 and *City of Fresno v. California* (1963), 372 U.S. 625, the water that EBMUD will be buying is federal water and not subject to state law. Our State Supreme Court, which once had different thoughts on the matter (in *Ivanhoe I,* reversed by the U. S. Supreme Court, *supra*), put the matter very clearly in *Ivanhoe II (Ivanhoe Irrigation District v. All Parties* (1960), 53 C.2d 692). What the court said about the projects there involved would seem to apply with equal force here:

> "[The United States Supreme Court] held that the United States may acquire, by condemnation if necessary, whatever water rights it may need to operate the project and that after such acquisition such rights are not subject to state control. Thus, whether or not the United States now has complete title to the waters here involved is totally immaterial to the issues involved on these appeals. Obviously, the federal government may contract to sell water that it does not own, as long as it has the legal power to secure title. The United States Supreme Court has declared as a matter of federal law that the United States possesses such power. That holding is binding on this court." (53 C.2d at 715)

The court went on to hold that since the trust theory which sought to make state law applicable had been overturned by the Supreme Court, the districts could validly contract with the federal government for the water. 53 C.2d at 716. The situation before us would seem to be identical. I find the various efforts in the briefs to make end-runs around *Ivanhoe* interesting and unpersuasive. Little would be gained by detailing them all here since they disregard the fundamental point that EBMUD will be buying federal water which is not subject to state law.

By way of illustration of plaintiffs' approach, they argue that "(u)nder the facts surrounding this case, however, there is no reason to believe that the federal government intended to assert an overriding interest that would vitiate provisions of state law." This not only ignores the effect of *Ivanhoe II* that EBMUD will be buying federal water, but it invites the court to speculate on the intent of the United States Government. At the same time, plaintiffs have chosen not to make the United States a party,* thus creating the situation where they seek this kind of speculation. The only evidence of the intent of the United States which is pleaded is its contract with EBMUD.

Moreover, plaintiffs and intervenor are in no way challenging the legality of the federal project. If the United States is legally building a project utilizing

*While intervenor and defendants apparently feel that the United States could not be joined, plaintiffs stated during oral argument that their decision not to join the United States was based on a desire to have the case decided in state court and on state law.

water from the American River—if the United States does this either free of state law or in compliance with applicable state law—then it is a little difficult to see how state law could block persons from buying the water that the United States is acquiring for the precise purpose of selling. To put this another way, if the United States is free to take the water regardless of state law, then making the water unsellable would render the United States' right to build the project meaningless; or, at best, seriously interfere with that right. Thus, federal supremacy is of at least as great importance here as in *Ivanhoe*. If, on the other hand, the United States is complying with the state laws relied on by plaintiffs in acquiring the American River water, then any basis for a cause of action tends to evaporate. Only if the federal government's acquisition of the water violated applicable state law might we be forced with a question of whether EBMUD's purchase of such water also violates state law. As already mentioned, no such violation by the federal government is urged here.

It should be noted that I am not expressing any view, because the question is not before me, on whether the federal government may lawfully take water from California rivers in quantities that would cause serious environmental damage.*

*That question may be in issue in other litigation. Plaintiffs' main brief advises the court that the State Water Resources Control Board has attempted to regulate and limit the diversion of water from the lower American, including the proposed federal diversion, with a view to protecting the environment of the river. Plaintiffs submitted with their briefs here Board Decisions 1379 and 1400 in this connection. Plaintiffs call the decisions "broad-

IV

Assuming for the sake of discussion that state law applies, does it help plaintiffs? They contend that Water Code Sections 1350 et seq., California Constitution Art. XIV, Section 3 and Water Code Section 100, impose on defendants a duty to reclaim waste water and not to purchase American River water from the federal government.

A. *Water Code Sections 13500 et seq.*

These sections are known as the Water Reclamation Law. Reading them suffices to show that they do not afford plaintiffs any basis for relief.

Section 13500 gives the title of the law. Section 13510 declares the public interest in the development of water reclamation facilities. Section 13511 contains legislative findings "that a substantial portion of the future water requirements of this state may be economically met by beneficial use of reclaimed water" and that such use "will contribute to the peace, health, safety and welfare of the people of the state." Section 13512 is a declaration that "(i)t is the intention of the legislature that the state undertake all possible steps to encourage development of water reclamation facilities so that reclaimed water may be made available to help meet the growing water requirements of the state."

ranging environmentally sensitive." Plaintiffs also advise the court that the United States has taken the position that these decisions conflict with congressional enactments authorizing the project. Plaintiffs further advise that water users' associations are litigating the validity of the Water Resources Control Board decisions and have temporarily enjoined their operation.

These provisions are followed by a section authorizing state loans for the development of reclamation facilities and studies pertaining to reclamation (Section 13515) and with a series of sections setting up machinery to control the quality of reclaimed water (Sections 13520-13526). Section 13527 deals with financial assistance; Section 13528 preserves the existing powers of the State Department of Public Health; Section 13530 provides for state surveys and investigations relating to waste water reclamation "to the extent funds are allocated therefor" and the final two sections restrict the use of waste wells.

It does not require extensive discussion to conclude that these provisions do not make it mandatory on anyone to reclaim waste water. I know of no legal alchemy to transmute these policy declarations into legal duties. The expression of legislative intent in Section 13512 leaves no doubt: What was intended is state encouragement of the development of water reclamation facilities. This is far different from mandating such development.

The Water Reclamation Law recognizes the importance of reclamation. The law authorizes state loans and establishes a mechanism for the regulation of water purity. But the Water Reclamation Law patently does not say: "Thou shalt recycle."

B. *California Constitution Article XIV, Sec. 3 and Water Code Sec. 100*

The constitutional argument requires more extensive discussion. Article XIV, Section 3 of the California Constitution provides:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

Water Code Section 100 repeats the first two sentences of Article XIV, Sec. 3. Water Code Section 101 repeats the third sentence.

Plaintiffs and intervenor contend that in view of their factual allegations, EBMUD's proposed acquisition of American River water is not a "beneficial use to the fullest extent" of these water resources, within the meaning of Article XIV, Sec. 3 and Water Code Sec. 100, and that it is an "unreasonable use" or unreasonable method of use or diversion or waste within the meaning of these provisions. Plaintiffs, but not intervenor, also contend that these provisions require defendents to reclaim waste water under the facts here alleged.

One attractive focus for both plaintiffs' and intervenor's views is the finding by the State Water Resource Control Board in Decision 1400 that the Bureau of Reclamation contract with EBMUD "eliminates the possibility of multiple beneficial uses of the water and is not sound management of the water resources."

If Article XIV, Section 3 and its statutory counterpart were before the courts for the first time, much could be said for the position of plaintiffs and intervenor. The long history of the constitutional provision, discussed by plaintiffs in their "Supplemental Brief on Scope of Article XIV, Section 3," sheds a different light.

The leading case setting out that history is *Gin S. Chow v. City of Santa Barbara* (1933), 217 Cal. 673, 695 et seq. Beginning with *Lux v. Haggin* (1886), 69 Cal. 255, California case law developed and adhered to the rule "that in a controversy between a riparian owner and an appropriator the doctrine of reasonable use does not apply." (*Chow* at 696.) Between riparian owners, each was limited to a reasonable use of the water. But "(a)s against an appropriator who seeks to divert water to nonriparian lands, the riparian owner is entitled to restrain any diversion which will deprive him of the customary flow of water which is or may be beneficial to his lands. He is not limited by any measure of reasonableness." *Miller Lux v. Madera Canal etc. Co.* (1909), 155 Cal. 59, 64.

The legislature attempted to curtail riparian rights in the Water Code of 1913, but its efforts were struck down in *Herminghaus v. Southern Cal. Edison Co.* (1926), 200 Cal. 81. See Maloney & Ausness, *A Modern Proposal for Regulation of Consumptive Use of Water* (1970), 22 Hast. Law Journal 523, 533.

Immediately following the *Herminghaus* decision, the legislature proposed an amendment to the Constitution. This proposal was adopted by the voters in 1928 as Article XIV, Sec. 3 (see *Chow, supra,* at 699). "It was because this court felt impelled to adhere to the long-established rule of *Lux v. Haggin, supra,* that a constitutional amendment was made necessary." *Id.* at 700. As the ballot argument stated: "Under present interpretations, the riparian owner is not bound by any rule of reasonableness in the use of water." (Quoted in Treadwell, *Developing a New Philosophy of Water Rights* (1950), 38 Cal. Law Rev. 572, 573.) For an excellent summary of the history of the amendment, see also *Joslin v. Marin Mun. Water District* (1967), 67 C.2d 132, 136-138.

What the constitutional amendment accomplished was, in a sense, the opposite of what plaintiffs want: It made it easier to take water and it did that by limiting riparian owners to a reasonable use. The words "waste" and "conservation" are used in the amendment and in the cases applying it, but in a particular way. As *Chow, supra,* observes (217 Cal. at 700), in the ballot argument "(t)he purpose of the amendment was stated to be 'to prevent the waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea.'" Compare Treadwell, *Modernizing the Water Law* (1928), 17 Cal. Law Rev. 1:

> "The problem stated in a broad way is the desire that the most extensive use practicable be made of the waters of the state. The obstacle in the way is the claim that a riparian owner is entitled to the full flow of the stream past his land, at least as far as it is in any way beneficial to him, no matter how extravagant and wasteful his use or enjoyment of the water may be . . ."

Of course, the appropriator's use must also be "reasonable." Thus, in *Tulare Dist. v. Lindsay-Strathmore Dist.* (1935), 3 C.2d 489, 547, the court said: "As the pressure of population has led to the attempt to bring under cultivation more and more lands and as the

demands for water to irrigate these lands have become more and more pressing, the decisions have become increasingly emphatic in limiting the appropriator to the quantity reasonably necessary for beneficial uses. (Citations) If the appropriator uses more than the amount so required, he gains no right thereto.

"An excessive diversion of water for any purpose cannot be regarded as a diversion for a beneficial use. Insofar as the diversion exceeds the amount reasonably necessary for beneficial purposes, it is contrary to the policy of the law and is a taking without right and confers no title, no matter for how long continued. (Citations) In determining what is a reasonable quantity for beneficial uses, it is the policy of the state to require within reasonable limits the highest and greatest duty from the waters of the state. (Citation) However, an appropriator cannot be compelled to divert according to the most scientific method known. He is entitled to make a reasonable use of water according to the general custom of the locality so long as the custom does not involve unnecessary waste. (Citation)"

In short, the amendment extended the rule of reasonableness to all water rights. *Joslin v. Marin Mun. Water Dist.* (1967), 67 C.2d 132, 138; *Peabody v. City of Vallejo* (1935), 2 C.2d 351, 383, and see Wiel, *The Pending Water Amendment to the California Constitution, and Possible Legislation* (1928), 16 Cal. Law Rev. 169, 175; Waldo, *Evaluation of California Water Rights Law* (1945), 18 So. Cal. Law Rev. 267; Harding, *Background of California Water and Power Problems* (1950), 38 Cal. Law Rev. 547, 552.

But to recognize that does not help plaintiffs. It does not help them because water rights are not involved here. Defendants claim no water rights in the American River; the parties are not rival claimants to property rights in the water of the river. Article XIV, Section 3 provides a basis for settlement of such rival claims: It delineates a basic water rights policy. The cases applying the constitutional provision concern competing claims to water rights. They provide no basis that I can discern for turning Article XIV, Section 3 into a broad environmental charter that extends to water purchasers.

I will illustrate rather than discuss these cases at length. *Peabody v. City of Vallejo* (1935), 2 C.2d 351, was litigation between riparian owners and an appropriator. See comment, 8 So. Cal. Law Rev. 235 (1935). *Tulare Dist. v. Lindsay-Strathmore Dist., supra,* dealt with the effort of prior appropriators to enjoin a subsequent one. 3 C.2d at 547-548. In *City of Lodi v. East Bay Municipal Utilities District* (1936), 7 C.2d 316, a prior vested right clashed with the claim of a subsequent appropriator. *City of Pasadena v. City of Alhambra* (1949), 33 C.2d 908, adjudicated ground water rights and, as many earlier decisions, clearly indicates that the constitutional provision deals with water rights:

> "Although the law at one time was otherwise, it is now clear that an overlying owner or any other person having a legal right to surface or

ground water may take only such amount as he reasonably needs for beneficial purposes. (Citations)." 33 C.2d at 925.

In that case, the court also held that failure to reclaim "storm waters and waters used to flush streets, fight fires, and flow sewage does not, as claimed by appellant, constitute waste in violation of Section 3 of Article XIV of the California Constitution." *Id.* at 934-935.

The most recent California decision on which the parties rely is *Joslin v. Marin Mun. Water Dist.* (1967), 67 C.2d 132. There riparian owners sought damages for diversion by an upstream appropriator who had built a dam. The court reviewed the history of the amendment and said (137-138):

> "The amendment was generally construed as applying a rule of reasonable use 'to all water rights enjoyed or asserted in this state, whether the same be grounded on the riparian right, of the overlying land owner, or the percolating water right, or the appropriative right.' (Citation) Thus the rule of reasonableness of use as a measure of the water right which had theretofore been applied as between other contesting claimants* but had been denied application as between riparian owners and appropriators was finally extended to include the latter. (Citations)"

* * *

*The court's footnote at this point says: "For example 'as between riparian owners (Citation); as between owners overlying an underground water supply (Citation); as between appropriators (Citation); as between overlying owners and exporters from an underground basin to nonoverlying lands (Citation); and as between riparian owners and overlying owners under the doctrine of common source of supply (Citation); . . .'"

Where does this long history take us? It is clear that for plaintiffs to prevail, two things have to be true of Article XIV, Section 3. It must cover environmental considerations of the kind urged here and it must extend beyond the regulation of water rights.

The meaning of constitutional provisions changes. We know that the due process clause, the equal protection clause, the prohibition of cruel and unusual punishment—to name only a few—are applied quite differently today than they were a few decades ago. Justice Leonard Friedman recently wrote of the problems of applying a constitution in a changing world as problems of "principled response; not expediency, but allegiance to fundamental purpose as applied to new conditions; not rigidity, but adaptable firmness." (Quoted by Justice Mosk in 12 CLTJ 21 at 28 (1973))

As to the first of the two major issues, our understanding of water conservation problems has advanced over what it was in 1928 or 1948. We know today that wild rivers are an irreplaceable resource. As our everyday life becomes more urban, we have become increasingly conscious of the great need to protect and enhance our physical environment, including our rivers and our shrinking wilderness areas. We have given legislative recognition to this need. See, e.g., the Environmental Quality Act of 1970 (Public Resources Code, Sections 2100 et seq.). In light of this, I have no great difficulty in saying that what is "reasonable" under Article XIV, Section 3, is not fixed and that today a determination of reasonableness should properly include, when appropriate

under the facts, environmental factors such as the recreational, fish and wildlife uses of a river. Court decisions applying Article XIV, Section 3, do not preclude such a view and this appears to be the interpretation of the State Water Resources Control Board, an interpretation entitled to considerable respect. See Decisions 1379 and 1400.

What the court decisions do preclude a trial judge from doing is to extend Article XIV, Section 3, beyond competing claims to water rights. *Joslin* is only six years old and sets forth the view which our Supreme Court has consistently taken. It can, of course, be argued that the question has not been squarely presented to the appellate courts, that past litigation has involved competing water rights claims and that, therefore, the courts have not had to decide whether the constitutional provision has any scope of operation beyond the resolution of such claims.

This argument may be available to an appellate court. However, as I have tried to indicate, the provision throughout its history has been viewed as dealing with asserted water rights and, specifically, as extending the rule of reasonableness to contests between riparian owners and appropriators. I have no basis for now turning the provision into something very different.

CONCLUSION

Trial court judges who write decisions, especially long ones in complex areas, should be given a Miranda warning. I have ventured to put pen to paper here without pride of authorship or scholarship, but because of the importance of the issues raised and for whatever help it might be to reviewing courts.

The parties have raised questions in addition to the ones I have discussed. The dispositions of the issues above makes discussion of these questions unnecessary. Specifically, I have not decided whether to take judicial notice of a number of documents which defendants submitted with a request to take judicial notice.

In light of the foregoing discussion, the demurrers must be sustained. Plaintiffs have made it clear that they have no other theories for relief. They repleaded the same theories in their amended complaint. Nothing would be gained by granting further leave to amend.

It is, therefore, ordered that the demurrers to the first amended complaint and to the complaint in intervention be and the same hereby are sustained without leave to amend.

Dated: April 26, 1973.

/s/ George Brunn
George Brunn
Judge of the Superior Court Pro Tem